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United States Department of Agriculture

Agricultural Marketing Service

Washington, D.C. 20250

Perishable Agricultural Commodities Act, 1930

and

Regulations (Other Than Rules of Practice)

Regulations Effective
October 1, 1982

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REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

7 CFR PART 46

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REGULATIONS (Other Than Rules of Practice)

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PERISHABLE AGRICULTURAL COMMODITIES ACT52

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REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930 (7 CFR Part 46)

DEFINITIONS

§ 46.1 Words in singular form.

Words in this part in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

§ 46.2 Definitions.

The terms defined in the first section of the act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the act, or in the trade shall be construed as follows:

(a) "Act" means the Perishable Agricultural Commodities Act, 1930, approved June 10, 1930, and legislation supplementary thereto and amendatory thereof (46 Stat, 531; 7 U.S.C., 499a-499s);

CROSS REFERENCE: For rules of practice under the act, see 7 CFR 47.1 to 47.25 for reparation proceedings; and 7 CFR 1.130 to 7 CFR 1.151 for formal adjudicatory administrative (disciplinary) proceedings; and 7 CFR 47.47 to 7 CFR 47.68 for determining a person is responsibly connected with a licensee.

(b) "Department" means the United States Department of Agriculture.

(c) "Secretary" means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his stead.

(d) "Service" means the Agricultural Marketing Service, United States Department of Agriculture.

(e) "Deputy Administrator" means the Deputy Administrator, Regulatory Programs, of the Agricultural Marketing Service, or any officer or employee of the Service, to whom authority has heretofore lawfully been delegated, or to whom authority may hereafter lawfully be delegated, to act in his stead.

(f) "Division" means the Fruit and Vegetable Division of the Service.

(g) "Director" means the Director of the Division or any officer or employee of the Division to whom authority has heretofore lawfully be delegated, or to whom authority may hereafter lawfully be delegated by the Director, to act in his stead.

(h) "In commerce" means interstate or foreign commerce as defined in paragraphs (3) and (8) of the first section of the act.

(i) "Person" means any individual, partnership, corporation, association, or separate legal entity.

(j) "Retailer" means a person engaged in the business of selling to consumers only.

(k) "Firm" means any person engaged in business as a commission merchant, dealer or broker.

(l) "Licensee" means any firm who holds an unrevoked and valid unsuspended license issued under the act.

(m) "Dealer" means any person engaged in the business of buying or selling produce in wholesale or jobbing quantities in commerce, and includes;

- (1) Jobbers, distributors and other wholesalers;
- (2) Retailers, when the invoice cost of all purchases of produce exceeds \$230,000 during a calendar year. In computing dollar volume, all purchases of fresh and frozen fruits and vegetables are to be counted, without regard to quantity involved in a transaction or whether the transaction was intrastate, interstate or foreign commerce;
- (3) Growers who market produce grown by others.
- (4) The term "dealer" does not include persons buying produce other than potatoes, for canning and/or processing within the State where grown, whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine.

(n) "Broker" means any person engaged in the business of negotiating sales and purchases of produce in commerce for or on behalf of the vendor or the purchaser, respectively, except that no person shall be deemed to be a "broker" within the meaning of the Act if such person is an independent agent negotiating sales for or on behalf of the vendor and if the only sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of \$230,000 in any calendar year.

(o) "Shipper" means any person operating at shipping point who is engaged in the business of purchasing produce from growers or others and distributing such produce in commerce by resale or other methods, or who handles such produce on joint account with others.

(p) "Grower" means any person who raises produce for marketing.

(q) "Grower' agent" means any person operating at shipping point who sells or distributes produce in commerce for or on behalf of growers or others and whose operations may include the planting, harvesting, grading, packing, and furnishing containers, supplies, or other services.

(r) "Receiving market commission merchant" means any person operating on a receiving market who is engaged in the business of receiving produce in commerce for sale, on commission, for or on behalf of another.

(s) "Joint account transaction" means a produce transaction in commerce in which two or more persons participate under a limited joint venture arrangement whereby they agree to share in a prescribed manner the costs, profits, or losses resulting from such transaction.

(t) "Produce" means any perishable agricultural commodity, as defined in paragraph (4) of the first section of the act.

(u) "Fresh fruits and fresh vegetables" include all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but does not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character. The effects of the following operations shall not be considered as changing a commodity into a food of a different kind or character: Water or steam blanching, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seed, pits, stems, calyx, husk, pods, rind, skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents used to retard oxidations; mixing of several kinds of sliced, chopped, or diced fruits or vegetables for packaging in any type of container; or comparable methods of preparation.

(v) "Frozen fruits and vegetables" include all produce defined in paragraph (u) of this section when such produce is in frozen form.

(w) "Cherries in brine" means cherries packed in an aqueous solution containing sulphur dioxide or other bleaching agent of sufficient strength to preserve the product, with or without the addition of hardening agents.

(x) "Wholesale or jobbing quantities," as used in paragraph (6) of the first section of the act, means aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day

shipped, received, or contracted to be shipped or received.

(y) "Truly and correctly to account" means, in connection with:

- (1) Consignments, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or other disposition of the produce, and the proper, usual or specifically agree upon selling charges and expenses properly incurred or agreed to in the handling thereof, plus any other information required by § 46.29;
- (2) Joint account transactions, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price or other disposition of produce, the joint account cost of the produce, and the expenses properly incurred or other charges specifically agreed to in the handling thereof, plus any other information required by § 46.29;
- (3) Buying brokerage transaction, to account by rendering a true and correct itemized statement showing the cost of the produce, the expenses properly incurred, and the amount of brokerage charged.

(z) "Account promptly," except when otherwise specifically agreed upon by the parties, means rendering to the principal a true and correct accounting:

- (1) In connection with buying brokerage transactions, within 24 hours after the date of shipment;
- (2) In connection with consignment or joint account transactions, within 10 days after the date of final sale with respect to each shipment: *Provided*, That whenever a grower's agent or a shipper distributes individual lots of produce for or on behalf of others, his accounting shall be made within 5 days after the date he is paid by the purchaser or receives the accounting on consigned or joint account transactions. Whenever a grower's agent or shipper harvests, packs, or distributes entire crops or multiple lots therefrom for or on behalf of others, he shall make interim accountings at reasonable intervals and a final accounting within a reasonable time following the close of the season's transaction: *Provided further*, That nothing in the regulations in this part shall prohibit

cooperative associations from accounting to their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws; and

(3) In connection with a consignment or joint account transaction, within 10 days after the date of receipt of payment of a carrier claim filed.

(aa) "Full payment promptly" is the term used in the act in specifying the period of time for making payment without committing a violation of the act. "Full payment promptly," for the purpose of determining violations of the act, means:

- (1) Payment of the net proceeds for produce received on consignment or the pro rata share of the net profits for produce received on joint account, within 10 days after the day on which the final sale with respect to each shipment is made;
- (2) Payment by growers, growers' agents or shippers of deficits on consignments or joint account transactions, within 10 days after the day on which the accounting is received;
- (3) Payment of the purchase price, brokerage, and other expenses to buying brokers who pay for the produce, within 10 days after the day on which the broker's invoice is received by the buyer;
- (4) Payment of brokerage earned and other expenses in connection with produce purchased or sold, within 10 days after the day on which the broker's invoice is received by the principal;
- (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;
- (6) Payment to growers, growers' agents or shippers by terminal market agents or brokers, who are selling for the account of a grower, growers' agent or shipper and are authorized to collect from the buyer or receiver, within 5 days after the agent or broker receives payment from the buyer or receiver;
- (7) Payment to the principal, within 10 days after receipt, of net proceeds realized from a carrier claim in connection with a consignment transaction or, in connection with a joint account transaction, payment to the joint account partners of their share of the joint account net proceeds realized from a carrier claim;

- (8) Payment by growers' agents or shippers distributing individual lots of produce for or on behalf of others, within 5 days after receipt of payment from the purchaser or receipt of the net proceeds on consigned or joint account transactions;
- (9) Partial payments at reasonable intervals during the shipping season by a growers' agent or shipper who harvests, packs, or distributes entire crops or multiple lots therefrom for or on behalf of others and final payment within a reasonable time following the close of the season's transactions: *Provided, however,* That as an exception to subparagraphs (1) through (9) of this paragraph, the parties may, by express agreement at the time the contract is made, provide a different time for payment, and if they have so agreed, then payment within the time provided shall constitute "full payment promptly": *Provided further,* That the party claiming the existence of such express agreement as to time of payment shall have the burden of proving it.

Nothing in the regulations in this part shall limit the seller's privilege of shipping under a closed or advise bill of lading or other arrangement requiring cash on delivery unless there has been express prior agreement to the contrary between the parties; or prohibit cooperative associations from settling with their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws. Payment in connection with any transaction or situation not specifically covered herein shall be made within a reasonable time; and, if there is a dispute concerning a transaction, the foregoing time periods apply only to the undisputed amount.

(bb) "Reject without reasonable cause" means in connection with purchases, consignments, or joint account transactions:

- (1) Refusing or failing without legal justification to accept produce within a reasonable time;
- (2) Advising the seller, shipper, or his agent that produce, complying with contract, will not be accepted;
- (3) Indicating an intention not to accept produce through an act or failure to act inconsistent with the contract; or
- (4) Any rejection following an act of acceptance.

(cc) "Reasonable time," as used in paragraph (bb) of this section, means:

- (1) For frozen fruits and vegetables with respect to rail shipments, 48 hours after notice of arrival and the produce is made accessible for inspection, and with respect to truck shipments, not to exceed 12 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection;
- (2) For fresh fruits and vegetables with respect to rail shipments, not to exceed 24 hours after notice of arrival and the car has been placed in a location where the produce is made accessible for inspection; and with respect to truck shipments, not to exceed 8 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection; and, with respect to boat shipments, not to exceed 24 hours after the produce is unloaded and made accessible for inspection and the receiver is given notice thereof;
- (3) If, within the applicable period, the receiver cannot make a thorough inspection due to adverse weather condition or applies for but cannot obtain Federal inspection before the end of this period, and so notifies the consignor within the applicable period, the period shall be extended until weather conditions permit inspection or until Federal inspection is made, as the case may be, plus two hours after either an oral or written report of the results of such inspection is made available to the receiver; and
- (4) In computing the time periods specified above, (i) for shipments arriving on non-work days or after the close of regular business hours on work days when a representative of the receiver having authority to reject shipments is not present, non-working hours preceding the start of regular business hours on the next working day shall not be included; and (ii) for shipments arriving during regular business hours when a representative of the receiver having authority to reject shipments customarily is present, the period shall run without interruption except that, for shipments arriving less than two hours before the close of regular business hours, the unexpired balance of the time period shall be extended and run from the start of

regular business hours on the next working day.

(dd) "Acceptance" means:

- (1) Any act by the consignee signifying acceptance of the shipment, including diversion or unloading;
- (2) Any act by the consignee which is inconsistent with the consignor's ownership, but if such act is wrongful against the consignor it is acceptance only if ratified by him; or
- (3) Failure of the consignee to give notice of rejection to the consignor within a reasonable time as defined in paragraph (cc) of this section: *Provided*, That acceptance shall not affect any claim for damages because of failure of the produce to meet the terms of the contract.

(ee) "Employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

(ff) "Responsibly connected" means affiliation as individual owner, partner in a partnership, or officer, director or holder of more than 10 percent of the outstanding stock of a corporation or association.

(gg) "Branch or additional business facility," as used in Section 3(b) of the Act, means an office or outlet in a location other than that of the principal or main office of a firm, out of which or through which the firm purchases, sells, negotiates contracts, solicits, or handles consignments, or otherwise contracts in perishable agricultural commodities including seasonal, part-time and full-time operations. As used in this paragraph, "branch or additional business facility" includes, but is not limited to, the following:

- (1) Jobbers, Wholesalers, Distributors—Each location through which commodities are bought, sold, or otherwise contracted;
- (2) Retailers—Each outlet through which retail sales of commodities are made and each office which purchases commodities;
- (3) Trucker/Dealer—A truck is a "branch" office if the driver is authorized to buy, sell or otherwise contract for commodities on behalf of the firm;
- (4) Shippers—On-the-ground representatives making purchases, sales or otherwise contracting for commodities;
- (5) Brokers—Each office conducting contract negotiations including on-the-ground representatives negotiating contracts for commodities;

- (6) Processors—Each location at which commodities are purchased, sold or contracted to be purchased or sold;
- (7) Cooperatives—Each operation away from the main office that has responsibility to account for proceeds received from sales of commodities; or
- (8) Seasonal/Part-Time Operations—Any facility with on-the-ground representatives making purchases, sales, or otherwise contracting for commodities.

[28 FR 7067, July 11, 1963, as amended at 34 FR 18542, Nov. 21, 1969; 37 FR 14561, July 21, 1972; 44 FR 50575, Aug. 29, 1979]

LICENSES

§ 46.3 License required.

(a) No person shall at any time carry on the business of a commission merchant, dealer, or broker without a license which is valid and effective at such time.

(b) Separate licenses are required for each firm. More than one trade name may be used by the same person only after such trade names have been approved in writing by the Director.

(c) Joint account arrangements between two or more licensees are not considered to result in separate firms and, therefore, do not require separate licenses.

§ 46.4 Application for license.

(a) Any person who desires to obtain a license shall make application therefor on the currently approved form to be obtained from the Director or his representatives.

(b) The applicant shall furnish the following information:

- (1) Name or names in which business is conducted; place of business; mailing address; name, location and number of branches or additional business facilities, divisions or affiliates; name of firm succeeded and whether the applicant assumes responsibility of settling any complaints filed under the Act against the firm succeeded.
- (2) Type of business (i.e., wholesale, retail, trucking, processing, commission merchant, or broker), and whether the fruits and/or vegetables handled are fresh or frozen, or cherries in brine.

- (3) Type of ownership: If a corporation, applicant shall furnish (i) the month, day and year incorporated; (ii) the State in which incorporated, (iii) the name in which incorporated, and (iv) the address of the principal office.
- (4) Full legal name, all other names used, if any, and home address of the owner. If a partnership, the applicant shall furnish the full legal names, all other names used, if any, and home address of all partners, indicating whether general, limited or special partners; or if an association or corporation the applicant shall furnish the full legal names, all other names used, if any, and home address of all officers, directors and holders of more than 10 per centum of the outstanding stock and percentage of stock held by each such person. Minors shall also furnish the full name and home address of their guardian. If the applicant is a trust the name of the trust and full name and home address of the trustee shall be furnished.
- (5) Date when first became subject to the act. If business was conducted subject to the act prior to the filing of an application for a license, applicant shall furnish an explanation for such violation as prescribed in section 3(a) of the act.
- (6) Whether the applicant, or in case the applicant is a partnership, any partner, or in case the applicant is an association or corporation, any officer, director, or holder of more than 10 per centum of the outstanding stock, has prior to the filing of the application:
 - (i) Been connected with any firm whose license is under suspension or has been revoked. If so, he shall furnish the name and address of the firm whose license is under suspension or has been revoked and the details of such connection, including the dates thereof;
 - (ii) Been an officer, director, stockholder, partner, or owner of a firm against which there is an unpaid reparation award under the act. If so, he shall furnish the name and address of the firm against which the reparation was issued and the details of such connection, including the dates thereof;
 - (iii) Been an officer, director, stockholder, partner, or owner of a firm against which there is a pending complaint under the act known to the applicant. If so, he shall furnish the name and address of the firm against which there is a pending complaint;

(iv) Within three years been adjudicated or discharged as a bankrupt or was an officer, director, stockholder, partner or owner of a firm adjudicated or discharged as a bankrupt. If so, he shall furnish a copy of the petition in bankruptcy, including the schedule of creditors, the date of adjudication and certificate of discharge. He shall also furnish the estimated value of produce that will be handled by the new firm during an average operating month, percentage of business that will be handled on consignment or joint account, and amount of credit that will be incurred during an average operating month to provide a basis for determining the amount of the bond required;

(v) Been convicted of one or more felonies in any State or Federal court. If so, he shall furnish the name and date of birth of the party convicted, alias if any, name, location of court and date convicted, nature of felony, sentence imposed, where and length of time served; if paroled, date parole terminated;

(vi) Ever been licensed under the act. If so, he shall furnish the name and address of licensee and whether license is still in effect.

(7) Whether any person employed by the applicant has been responsibly connected with any firm whose license has been revoked, or is currently under suspension, or who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 2 of the act, or against whom there is an unpaid reparation award which has been issued within the past two years, subject to his right of appeal. If so, he shall furnish the full legal name of the person, the name of the firm involved, and the details of such connection, including the dates thereof.

(8) Any other information the Director deems necessary to establish the identity and eligibility of the applicant to obtain a license.

(c) The application shall be signed by the owner, all general partners, or, in case the applicant is an association or corporation, a duly authorized official.

(d) The application and fees shall be forwarded to the Director, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, or to his representative. An application which does not contain full or complete answers to all the questions, or is not properly signed, or not accompanied by the proper fee, or bond as required under paragraph (c) and (e) of section 4 of the act shall not be considered a

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valid application for license. The "period not to exceed 30 days" as prescribed in section 4(d) of the act shall commence on the day that a valid application for license is received by the Director or his representative.

(e) If the application is incomplete, the Director may return the application to the applicant with a request that the application be completed by furnishing the missing data. If the applicant does not respond to this request within 30 days after it is mailed by the Director, the fees submitted shall be refunded.

(f) If the Director has reason to believe that the application contains inaccurate information, he may afford the applicant an opportunity to submit a corrected application or verify or explain information contained in the application. If the applicant submits a corrected application, the original application shall be considered withdrawn. If the applicant, in response to the Director's request, submits additional or corrected information for consideration in connection with his original application, the original application plus such information shall be considered as constituting a new application.

(g) Fees shall be refunded whenever an application is withdrawn without the filing of a new application.

(h) When a valid application is received and the provisions of paragraphs (b) and (c) of section 4 of the act are applicable, the Director shall notify the applicant by letter of the pertinent provisions of this section and the reasons for denial of license and shall refund the fee.

(i) If the Director disapproves the use of a trade name which, in his opinion, is deceiving, misleading or confusing to the trade, he shall return the application to the applicant for the selection of a different trade name. If the applicant does not return the application within thirty days after it was mailed by the Director, the fees submitted shall be refunded. The "period not to exceed thirty days" as prescribed in section 4(d) of the act shall commence on the date that the application for license under the new name is received by the Director or his representative.

[28 FR 7067, July 11, 1963; 28 FR 7287, July 17, 1963, as amended at 44 FR 50575, Aug. 29, 1979]

§ 46.5 Bonds.

Bonds prescribed in Section 4(c), 4(e), 8(b), and 13(b) of the Act shall be in the form of cash or surety bonds in the form and amount satisfactory to the Director and shall not be less than \$10,000. When

§ 46.5

cash is posted as surety, it shall be deposited into a special account of the United States Treasury and no interest is to accrue or be paid the licensee. When surety bonds are furnished, the surety shall be a company holding a certificate of authority from the Secretary of the Treasury under Act of Congress approved July 30, 1947. (6 U.S.C. secs. 6-13) as acceptable surety on Federal bonds.

§ 46.6 License fee.

The annual license fee is one hundred and eighty (180) dollars plus seventy-two (72) dollars for each branch or additional business facility operated by the applicant exceeding nine. In no case, shall the aggregate annual fees paid by any applicant exceed one thousand two-hundred (1,200) dollars. The Director may require that the fee be submitted in the form of a money order, bank draft, cashier's check, or certified check made payable to Agricultural Marketing Service. Authorized representatives of the Division may accept fees and issue receipts therefor.

[47 FR 30997 July 16, 1982]

§ 46.7 Issuance of license.

Upon receipt of a valid application accompanied by the proper fee for a license and bond, if required, the Director shall, if the applicant is found to be eligible, issue a license certifying that the licensee is authorized to engage in the business of a commission merchant, dealer, or broker. All fees and any additional sums assessed by the Director in accordance with the act, shall be deposited in a special fund designated as the "Perishable Agricultural Commodities Act fund."

§ 46.8 Copies of licenses.

Copies of licenses may be issued upon request and upon the payment of a fee of two dollars (\$2) for each copy. Each copy shall bear the word "copy" in conspicuous letters on its face and shall be certified by the Director as a true copy of the original.

§ 46.9 Termination, suspension, revocation, cancellation of licenses; notice; renewal.

(a) Under section 3(c) of the act the license can be suspended if the licensee continues to use a trade name after being notified by the Director that such trade name has been disapproved.

(b) Under section 4(a) of the act, after October 1, 1962, the license of any individual, corporation or association shall automatically terminate on the date of discharge in bankruptcy and the license of any partnership shall automatically terminate on the date of the discharge in bankruptcy of any of the general partners in the partnership.

(c) Under section 4(c) of the act if a license is issued under a bond and the bond is terminated for any reason without the approval of the Director, within four years from the date of the issuance of the license, the license shall be automatically cancelled as of the date of termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. Also, if the Director notifies the licensee that a bond in an increased amount is required and the licensee fails to provide such a bond within the specified time the license of such licensee shall be automatically suspended until such bond is provided.

(d) Under section 8(a) of the act a license can be suspended or revoked for violations of section 2 of the act or when the licensee is found guilty in a Federal Court of having violated section 14(b) of the act.

(e) Under section 8(b) of the act a license can be suspended or revoked if the licensee continues to employ any person in violation of the provisions of this section. Also, if any licensee is authorized to employ any person under a bond in accordance with this section and is notified by the Director subsequently to provide a bond in an increased amount and fails to provide such a bond within the time specified, approval of employment shall automatically terminate.

(f) Under section 8(c) of the act a license can be revoked for any false or misleading statement, or through a misrepresentation or concealment or withholding of facts in connection with an application for a license.

(g) Under section 9 of the act a license can be suspended if the licensee fails to keep such accounts, records, and memoranda that fully and correctly disclose all transactions involved in his business including the true ownership of such business by stockholding or otherwise.

(h) Under Section 13 of the Act a license can be suspended:

- (1) if the licensee refuses to permit inspection of his records or of any lot of produce under his ownership or control; or
- (2) if the licensee, subsequent to a determination in a formal disciplinary proceeding

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that it has violated the prompt payment provision of Section 2(4) of the Act, refuses to permit an inspection of its accounts, records and memoranda to insure that it is in compliance with the prompt payment provision of Section 2(4) of the Act or fails or refuses to furnish, maintain, or adjust a surety bond in a form and amount satisfactory to the Secretary.

(i) Under section 4(a) of the act at least thirty days prior to the anniversary date of a valid and effective license, the Director shall mail a notice to the licensee at the last known address advising that the license will automatically terminate on its anniversary date unless the annual fee is paid on or before such date. If the annual fee is not paid by the anniversary date, the licensee may obtain a renewal of that license at any time within 30 days of that date by paying the annual fee, plus 5 dollars (\$5). Within 60 days after the termination date of a valid and effective license, the former licensee shall be notified of such termination, unless a new license has been obtained in the meantime.

[28 FR 7067, July 11, 1963; 28 FR 7287, July 17, 1963, as amended at 44 FR 50576, Aug. 29, 1979]

§ 46.10 Nonlicensed person: liability; penalty.

Any commission merchant, dealer, or broker who violates the act by engaging in business subject to the act without a license may settle his liability, if such violation is found by the Director not to have been willful but was due to inadvertence, by paying the amount of fees that he would have paid had he obtained and maintained a license during the period that he engaged in business subject to the act, plus an additional sum not in excess of twenty-five dollars (\$25), as may be determined by the Director.

§ 46.11 What constitutes valid license, form and use.

Each license shall bear a serial number, the names in which authorized to conduct business, type of ownership; if the business is individually owned, the name of the owner; if a partnership, the names of all general partners; the facsimile signature of the Director; the seal of the Department and shall be duly countersigned. The licensee may place upon his stationery, trucks, or business sign an inscription indicating that he is licensed under the Act, but such inscription must not be of such form or arrangement as to be deceptive or misleading to the public, nor shall any such inscription be displayed or used unless the person using the inscription has a

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license valid and effective at the time.

§ 46.12 Forms of inscriptions.

The following inscriptions, for use with or without the license number, meet the foregoing requirements and may be used by licensees: "Licensed by the U.S. Department of Agriculture under the Perishable Agriculture Commodities Act," or "Licensed under the PACA."

§ 46.13 Address, ownership, changes in trade name, changes in number of branches, changes in members of partnership, and bankruptcy

The licensee shall:

- (a) promptly report to the Director in writing:
 - (1) any change of address;
 - (2) any change in officers, directors, and holders of more than ten percent of the outstanding stock of a corporation, with the percentage of the stock held by each person;
 - (3) any deletions or additions of trade names;
 - (4) any change in the number and address of any branches or additional business facilities, and;
 - (5) when the licensee, or if the licensee is a partnership, any partner is subject to proceedings under the bankruptcy laws. A new license is required in case of a change in the ownership of a firm, an addition or withdrawal of members of a partnership, or in case business is conducted under a different corporate charter from that under which the license was originally issued.
- (b) obtain approval from the Director prior to using any trade name.

[44 FR 50576, Aug. 29, 1979]

ACCOUNTS AND RECORDS (GENERAL)

§ 46.14 General.

- (a) Every commission merchant, dealer, and broker shall prepare and preserve for a period of two years from the closing date of the transaction the accounts, records, and memoranda required by the act, which shall fully and correctly disclose all transactions involved in his business. Licensees shall keep records which are adapted to the particular business that the licensee is conducting and in each case such records shall fully disclose all transactions in the business in sufficient detail as to be

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readily understood and audited. It is impracticable to specify in detail every class of records which may be found essential since many different types of business are conducted in the produce industry and many different types of contracts are made covering a wide range of services by agents and others. The responsibility is placed on every licensee to maintain records which will disclose all essential facts regarding the transactions in his business.

(b) Every commission merchant, dealer, and broker shall prepare and preserve records and memoranda required by the Act which shall fully and correctly disclose the true ownership and management of such business during the preceding four years. Such records shall include the number and location of all branches or additional business facilities operated by or for the commission merchant, dealer or broker. In the case of a corporation, such records shall include the corporate charter, record of stock subscription and stock issued, the amounts paid in for stock and minutes of stockholders' and directors' meetings showing the election of directors and officers, resignations and other pertinent corporate actions. In the case of a partnership, the records shall contain a copy of the partnership agreement showing the type of partnership, the full names and addresses of all partners including general, special or limited partners, the partnership interest of each individual, and any other pertinent records of the partnership.

[28 FR 7067, July 11, 1963; 28 FR 7287, July 17, 1963, as amended at 44 FR 50576, Aug. 29, 1979]

§ 46.15 Documents to be preserved.

Bills of lading, diversion orders, paid freight and other bills, car manifests, express receipts, confirmations and memorandums of sales, letter and wire correspondence, inspection certificates, invoices on purchases, receiving records, sales tickets, copies of statements (bills) of sales to customers, accounts of sales, papers relating to loss and damage claims against carriers, records as to reconditioning, shrinkage and dumping, daily inventories by lots, a consolidated record of all rebates and allowances made or received in connection with shipments handled for the account of another, an itemized daily record of cash receipts, ledger records in which purchases and sales can be verified and all other pertinent papers relating to the shipment, handling, delivery, and sale of each lot of produce shall be preserved for a period of 2 years.

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§ 46.16 Method of preservation or storage of records.

All records required to be preserved under the act shall be stored in an orderly manner and in keeping with sound business practices. The records being currently used shall be filed in order by dates, by serial numbers, alphabetically or by any other proper method which will enable the licensee to promptly locate and produce the records. Records in dead storage should be arranged in an orderly fashion, be packaged or wrapped to insure proper preservation, be adequately marked or identified, and stored in a safe, dry location. When part of the records are forwarded to others (such as accountants, traffic agencies, attorneys, etc.), proper notations should be filed in appropriate places in the records identifying the missing records and stating where they can be located.

§ 46.17 Inspection of records.

Each licensee shall, during ordinary business hours, promptly upon request, permit any duly authorized representative of the Department to enter his place of business and inspect such accounts, records, and memoranda as may be material (a) in the investigation of complaints under the Act, or (b) to the determination of ownership, control, packer, or State, county, or region of origin in connection with commodity inspections, or (c) to ascertain whether there is compliance with Section 9 of the Act, or (d) in administering the licensing and bonding provisions of the Act, or (e) if the licensee has been determined in a formal disciplinary proceeding to have violated the prompt payment provision of Section 2(4) of the Act, to determine whether, at the time of the inspection, there is compliance with that Section. Any necessary facilities for such inspection shall be extended to such representative by the licensee, his agents, and employees.

[44 FR 50576, Aug. 29, 1979 2979]

RECORDS OF MARKET RECEIVERS

§ 46.18 Record of produce received.

Market receivers shall keep in the order of receipt a record of all produce received and this record shall be in the form of a book (preferably a bound book) with numbered pages or comparable business record. This record shall clearly show for each lot the date of arrival and unloading; whether received by freight, express, truck, or otherwise; the car initials and number; the truck license number and the

driver's name or the name of the trucking firm; the number of packages or the quantity received; the kind of produce; the name and address of the consignor or seller; whether the produce was purchased; consigned or received on joint account; and the disposition of the produce, whether jobbed or sold in carlots or trucklots, and the lot number assigned to the shipment by the receiver (as required by 46.20).

§ 46.19 Sales tickets.

Sales tickets shall bear printed serial numbers running consecutively and shall be used in numerical order so far as practicable. No serial number shall be repeated within a 90-day period. The sales tickets shall be prepared and all the details of the sale shall be entered on the tickets in a legible manner in order that an audit can be readily made. Erasures, strike-outs, changes, etc. should be held to the minimum. When errors are made in preparing sales tickets, the tickets should be voided. Each sales ticket shall show the date of sale, the purchaser's name (so far as practicable), the kind, quantity, the unit price, and the total selling price of the produce. Each sales ticket shall show the lot number of the shipment if the produce is being handled on consignment or on joint account. Sales tickets on all other lots of the same commodity which are on hand at the same time shall also show a lot number. The original or a legible carbon copy of each sales ticket, including those voided or unused, shall be accounted for and shall be filed or stored either by dates of sales or in the order of the serial numbers for a period of two years.

§ 46.20 Lot numbers.

An identifying lot number shall be assigned to each shipment of produce to be sold on consignment or joint account or for the account of another person or firm. A lot number should be assigned to any purchased shipment in dispute between the parties to assist in proving damages. A lot number shall be assigned to each purchased shipment of similar produce on hand at that time or received later while the consigned or joint account or disputed lot is being sold. A lot number shall be assigned to each purchased shipment which is reconditioned if the seller is to be charged with the shrinkage or loss. The lot number shall be entered on the receiving record in connection with each shipment and entered on all sales tickets identifying and segregating the sales from the various shipments on hand. The lot number shall be entered on the sales tickets

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by the salesmen at the time of sale or by the produce dispatcher, and not by bookkeepers or others after the sales have been made. No lot number shall be repeated with a period of 30 days after the last sale from the preceding lot to which such number was assigned.

§ 46.21 Returns, rejections, or credit memorandums on sales.

In the event of the rejection and return of any produce sold for or on behalf of another or consignment or joint account, or of any necessary allowance or adjustment being made to the buyers thereof, a credit memorandum showing the buyer's name, sales ticket number, lot number, date of the granting of the allowance, and amount of the credit or adjustment, with reasons therefor, shall be made or a notation shall be made on the original sales ticket referring to the adjustment and showing where the credit memorandum is filed. The credit memorandum shall be on a regular form, in a ledger book, or on a sales ticket or invoice properly completed to show the facts and shall be approved by a duly authorized person. Credits granted shall be entered in the same records as the original sales tickets.

§ 46.22 Accounting for dumped produce.

A clear and complete record shall be maintained showing justification for dumping of produce received on joint account, on consignment, or handled for or on behalf of another person if any portion of such produce regardless of percentage cannot be sold due to poor condition or is lost through resorting or reconditioning. In addition to the foregoing, if five percent or more of a shipment is dumped, an official certificate, or other adequate evidence, shall be obtained to prove the produce was actually without commercial value, unless there is a specific agreement to the contrary between the parties. The original certificate or other adequate evidence justifying dumping shall be forwarded to the consignor or joint account partner with the accounting and a copy shall be retained by the receiver.

§ 46.23 Evidence of dumping.

Reasonable cause for destroying any produce exists when the commodity has no commercial value or when it is dumped by order of a local health officer or other authorized official or when the shipper has specifically consented to such disposition. The term "commercial value" means any value that a commodity may have for any purpose that can

be ascertained by the exercise of due diligence without unreasonable expense or loss of time. When produce is being handled for or on behalf of another person, proof as to the quantities of produce destroyed or dumped in excess of five percent of the shipment shall be provided by procuring an official certificate showing that the produce has no commercial value from any person authorized by the Department to inspect fruits and vegetables. Where such inspection service is not available certification may be obtained from (a) any health officer or food inspector of any State, county, parish, city or municipality or of the District of Columbia; (b) any established commercial agency or service making inspections for the fruit and vegetable industry; or (c) when no inspector or health officer designated above is available consideration will be given to other evidence such as inspection and certification made by any two persons having no financial interest in the produce involved or in the business of any person financially interested therein, and who are unrelated by blood or marriage to any such financially interested person, and who, at the time of the inspection and certification, and for a period of at least one year immediately prior thereto, have been engaged in the handling of the same general kind or class of produce with respect to which the inspections and certification are to be made. Any certificate issued by any persons designated in paragraph (c) of this section shall include a statement that each of them possesses the requisite qualifications. Any such certificate shall properly identify the produce by showing the commodity, lot number, brand or principal identifying marks on the containers, quantity dumped, name and address of shipper, name and address of applicant, condition of the produce, time, place, and date of inspection and a statement that the produce possesses no commercial value.

RECORD OF RETAILERS

§ 46.24 Records of retailers.

Notwithstanding the specific records and documents prescribed in the foregoing sections, licensees who purchase produce solely for sale at retail shall establish and maintain accounts and records, adapted to their type of operations, which will fully and correctly disclose all transactions relating to the purchase of produce. Such accounts and records should include the date of receipt of each lot, kind of produce, number of packages and quantity, price paid, evidence of agreement or contract of purchase,

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bills of lading, paid bills, and any other documents relating to the purchase of produce.

AUCTION SALES

§ 46.25 Auction sales.

Commission merchants, dealers and brokers who offer produce for sale through auction companies which publish catalogs of offerings will be responsible for furnishing the auction company for publication true and correct information concerning the ownership of the produce. When the produce is offered for sale by an owner, his name shall be shown in the catalog listing as owner. When a joint account partner makes an offering, his name as well as that of his joint partner, or partners, shall be shown. When any person offers produce for sale at auction for the account of another, the name, or names of the owner, if known, and of his principal shall be shown. In addition to listing such name or names he may show that he is acting in the capacity of agent. If a person instructs an auction company to catalog a shipment without disclosing true ownership, if known, or the name of an agent's principal, he shall be deemed to have made a false or misleading statement within the meaning of the act. Since sales at auctions normally involve additional expenses, a broker, grower's agent or commission merchant shall have prior consent from his principal before such disposition is accomplished. Where a dispute exists regarding the ownership of produce, it may be listed in the auction catalog as being offered for sale "for the account of whom concerned" with the name of the party making the offering shown as agent.

DUTIES OF LICENSEES

§ 46.26 Duties of licensees.

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the act.

BROKERS**§ 46.27 Types of broker operations.**

(a) Brokers carry on their business operations in several different ways and are generally classified by their method of operation. The following are some of the broad groupings by method of operation. The usual operation of brokers consists of the negotiation of the purchase and sale of carlots either of one commodity or of several commodities. In negotiating a contract, a broker usually acts as agent of the buyer or the seller but not as agent of both parties. Frequently, carlot brokers never see the produce they are quoting for sale or negotiating for purchase by the buyer and they carry out their duties by relaying offers and counter-offers between the buyer and seller until a contract is effected. Generally, the seller of the produce invoices the buyer, however, when there is a specific agreement between the broker and his principal, the seller invoices the broker who, in turn, invoices the buyer, collects, and remits to the seller. Under other types of agreements, the seller ships the produce to the broker at destination who distributes to pool buyers, invoices the buyers, collects, and remits to the seller. Also, there are times when the broker is authorized by the seller to act much like a commission merchant being given blanket authority to dispose of the produce for the seller's account either by negotiation of sales to buyers not known to the seller or by placing the produce for sale on consignment with receivers in the terminal markets.

(b) There is a second general grouping of brokers which are commonly referred to as buying brokers. Their operations are typified by the fact that they act as the buyer's representative in negotiating purchase at shipping points, terminal markets, or intermediate points. Their typical type of operation is to negotiate a purchase on the buyer's instructions and authorization. Sometimes the broker negotiates the purchase without seeing the produce. In other instances he may select the merchandise after forming an appraisal of the quality of the produce being offered for sale on the market. Generally, a purchase is made in the buyer's name and the seller invoices the buyer direct. On the other hand, acting on authority given him by the buyer, the broker may negotiate purchases in his own name, pay the seller for the produce, make arrangements for its loading and shipment, and bill the buyer direct for the cost price plus the brokerage fee and the cost of any agreed upon accessorial service charges such as ice, loading, etc.

§ 46.28 Duties of brokers.

(a) *General.* The function of a broker is to negotiate, for or on behalf of others, valid and binding contracts. A broker who fails to perform any specification or duty, express or implied, in connection with any transaction is in violation of the act and is subject to the penalties specified in the act and may be held liable for damages which accrue as a result thereof. It shall be the duty of the broker to fully inform the parties concerning all of the terms and conditions of the proposed contract. After all parties agree on the terms and the contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement between the parties, including any express agreement as to the time when payment is due. The broker shall retain a copy of such confirmations or memoranda as part of his accounts and records. The broker who does not prepare these documents and retain copies in his files is failing to prepare and maintain complete and correct records as required by the act. The broker who does not deliver copies of these documents to all parties involved in the transaction is failing to perform his duties as a broker. A broker who issues a confirmation or memorandum of sale containing false or misleading statements shall be deemed to have committed a violation of section 2 of the act. If the broker's records do not support his contentions that a binding contract was made with proper notice to the parties, the broker may be held liable for any loss or damage resulting from such negligence, or for other penalties provided by the act for failure to perform his express or implied duties. The broker shall take into consideration the time of delivery of the shipment involved in the contract and all other circumstances of the transaction, in selecting the proper method for transmitting the written confirmation or memorandum of sale to the parties. A buying broker is required to truly and correctly account to his principal in accordance with § 46.2(y)(3). The broker should advise his principal promptly of rejection by the buyer or of any other unforeseen development of which he is informed.

(b) *Brokerage fees.* A broker is not considered to be entitled to a brokerage fee unless he effects a sale or makes a valid and binding contract, fully performing his duties as a broker. Unless otherwise specifically agreed, the broker does not guarantee the performance of the contracting parties and is entitled to receive prompt payment of the brokerage fee whenever a valid and binding contract is negotiated. Brokerage fees may be charged to only one

of the parties to the contract unless by prior agreement the parties agree to split the brokerage fee. If the brokerage fee is charged to both parties without a specific prior agreement, such action by the broker is a violation of the act. A broker employed to negotiate the sale of produce may not employ another broker or selling agent, including auction companies, without the specific prior approval of his principal. When the broker is authorized to sell, invoice the buyer, collect and remit to his principal, he shall render an itemized accounting to the principal promptly on receipt of payment, showing the true gross selling price, all brokerage fees deducted, any auction charges and any other expenses incurred in connection with the sale of the shipment. The failure to account truly and correctly and make full payment promptly is a violation of the act.

(c) *Broker's responsibility for payment.* In the absence of a specific agreement, a broker is not responsible for payment to the seller by the buyer. Agreement to collect from the buyer and remit to the seller is not a guarantee by the broker that the buyer will pay for the produce purchased, unless there is a specific agreement by the broker that he will pay if the buyer does not pay. A broker who agrees to collect funds from the buyer for his principal shall render an itemized accounting to the principal promptly on receipt of payment showing the true gross selling price, all brokerage fees deducted and all expenses including auction charges, incurred in connection with the sale of the shipment. The failure to account truly and correctly and make full payment promptly is a violation of the act. While the broker is not obliged to furnish his principal information regarding the financial condition of the buyer, if the broker furnishes such information, he must truthfully report the information available to him, and any false or misleading statements for a fraudulent purpose to the principal to encourage the sale will be a violation of the act. A buying broker who negotiates a purchase in his own name under an agreement with his principal, is responsible for payment of the purchase price to the seller. A broker has no authority to grant allowances or adjust the seller's invoice price to the buyer without the specific prior approval of his principal.

(d) *Purchases and sales by brokers.* A person who operates in a dual capacity, both as a broker and a dealer, shall clearly disclose his status in each transaction to all parties with whom he is dealing. If such a person misrepresents himself as a broker to the buyer or the seller when he is acting as a dealer purchasing produce or selling produce he has purchased, he shall be considered to have violated the

act. When a person purchases or sells produce as a dealer, he shall not request or receive a brokerage fee from the buyer or the seller. A broker shall not negotiate a transaction where the broker is subject to the direct or indirect control of any party to the transaction other than his principal, or where the other party is subject to the direct or indirect control of the broker without fully disclosing the circumstances to his principal and obtaining his specific prior approval.

(e) *Filing carrier claims by brokers.* Without prior consent of the owner, a broker has no authority to file claims with carriers in his own name or any name. A broker has no obligation to file carrier claims for the owners of the shipments. However, when a broker in a transaction receives information valuable to the owner in connection with carrier claim rights, the broker should promptly advise the owner. A broker who agrees to protect the carrier claims of owners shall at all times exercise reasonable care to fulfill such obligation. If a broker makes an agreement with a seller or a buyer to file and handle such a claim for the benefit of the owner of the produce, the claim shall be filed promptly with the carrier, supported by adequate evidence, and he shall take the necessary action to bring the matter to a conclusion. A copy of the claim shall be forwarded to the owner of the shipment when the claim is filed. When settlement of the claim is effected, the broker shall promptly remit the net amount due the owner, after deducting the agreed or customary charges for handling the claim. Adequate information shall be furnished the owner regarding the claim while the matter is being handled with the carrier. If the owner files the claim, the broker shall promptly furnish any necessary information available in his records which is requested by the owner.

[28 FR 7067, July 11, 1963, as amended at 37 FR 14561, July 21, 1972]

RECEIVING MARKET COMMISSION MERCHANTS AND JOINT ACCOUNT PARTNERS

§ 46.29 Duties.

(a) *General.* All licensees who accept produce for sale on consignment or on joint account are required to exercise reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner. A commission merchant engaged to sell consigned produce may not employ another person or firm, including auction companies, to dispose of all or part of such produce without the specific prior authority of the consignor. A commission mer-

chant is not authorized to sell consigned produce outside the market area where he is located without obtaining the permission of the consignor. Averaging or pooling of sales is not permissible unless the receiver obtains the specific written permission of the consignor prior to rendering the accounting. Complete and detailed records shall be prepared and maintained by all commission merchants and joint account partners covering produce received, sales, quantities lost, dates and cost of repacking or reconditioning, unloading, handling, freight, demurrage or auction charges, and any other expenses which are deducted on the accounting, in accordance with the provisions of § 46.18 through § 46.23. When rendering account sales for produce handled for or on behalf of another, an accurate and itemized report of sales and expenses charged against the shipment shall be made. It is a violation of section 2 of the act to fail to render true and correct accountings in connection with consignments or produce handled on joint account. Charges which cannot be supported by proper evidence in the records of the commission merchant or joint account partner shall not be deducted. The commission merchant or joint account partner may be held liable for any financial loss and for other penalties provided by the act, due to his negligence or failure to perform any specification or duty, express or implied, arising out of any transaction subject to the act.

(b) *Commission charges.* Before accepting produce on consignment, the parties should reach a definite agreement on the amount of the commission and other charges which will be assessed by the commission merchant. In the absence of such an agreement, only the usual and customary commission and other charges shall be permitted. The receiver may not reconsign produce to another person or firm, including auction companies, and incur additional commissions, charges or expenses without the specific prior authority of the consignor. Unless otherwise agreed upon by the parties, joint account partners shall not charge a commission fee or other selling charges against the joint account for disposing of the produce. When a portion of a consigned shipment is purchased by the commission merchant he shall not charge or receive a commission fee for such sales.

(c) *Purchasing consigned produce.* A commission merchant or joint account partner may not purchase produce received on consignment or joint account or sell such produce to any person or firm over whose business he has direct or indirect control, or to any person or firm having direct or indirect control over his business, without specific prior authority of the

consignor or the joint account partner. However, produce may be purchased by the commission merchant or joint account partner at reasonable market value to clean up remnants of shipments so accounting will not be unduly delayed, provided the accounting shows the quantity and price of the goods bought by the commission merchant or joint account partner. "Remnants," as used here, mean small quantities remaining after the bulk of the shipment has been sold but shall not exceed 5 percent of the shipment. When consigned produce is purchased by a commission merchant he shall not charge or receive a commission fee for such sales.

(d) *Filing carrier claims.* Without the prior consent of the owner of the produce, a commission merchant has no authority to file claims with carriers in his own name or any other name: *Provided*, That the commission merchant may file a claim for breakage where the owner has been paid for the full value of the produce without any deduction for damage. Commission merchants have no obligation to file carrier claims on shipments for the owners. However, when a commission merchant in a transaction receives information valuable to the consignor in connection with carrier claim rights, the commission merchant should promptly advise the consignor. Before a commission merchant files a carrier claim on a consigned shipment, a specific agreement shall be reached with the consignor. If a commission merchant is authorized and agrees to file the claim, he shall forward a copy of the claim filed with the carrier to the consignor and shall exercise reasonable care to protect the interests of the consignor by filing the claim promptly and in the proper amount, supported by adequate evidence, and shall take the necessary action to bring the matter to a conclusion. When settlement of the claim is effected, he shall promptly remit the net amount due the consignor, after deducting the agreed handling charges. Full and complete information shall be furnished the consignor while the claim is being handled. If the consignor is to file the claim, the commission merchant shall exercise reasonable care to protect the claim rights of the consignor and shall promptly furnish all necessary information and evidence from his records to enable the consignor to file a proper claim. A joint account partner who files a carrier claim on behalf of the partnership shall forward a copy of the claim filed with the carrier to his partner, keep him advised of its status, and remit promptly his share of the net proceeds realized from such claim.

GROWERS' AGENTS AND SHIPPERS

§ 46.30 Types of operations by growers' agents and shippers.

(a) The usual operations of shippers consist of purchasing produce from growers in their own names. They distribute the produce in commerce by selling, consigning, or jointing the shipments, assuming any loss of profits that result from these operations. In addition, shippers may handle produce on joint account with growers or others.

(b) Growers' agents sell and distribute produce for or on behalf of growers and others and, in addition, may perform a wide variety of services, such as financing, planting, harvesting, grading, packing, furnishing labor, seed, containers, and other supplies or services. They usually distribute the produce in their own names and collect payment direct from the consignees. They render accountings to their principals, paying the net proceeds after deducting their expenses and fees. Some agents are limited by contract to making only sales and cannot joint or consign produce without obtaining the prior consent of the growers. Other agents are granted blanket authority by the growers to market and distribute the produce, using their discretion as to the best methods, depending on market conditions and the quality of the produce available. They can sell, consign or ship on joint account, use the services of brokers or sell through terminal market auctions. They are authorized to grant credits, make adjustments in the invoice price, handle claims with the carriers, or even abandon shipments, when circumstances justify such action, without consulting the growers. Some agents have an agreement with the growers to pool the produce and render accounting on the basis of the average or prorated selling prices after deducting the prorated expenses incurred for the various operations performed and the agents' selling fees. Some agents' contracts require an accounting on the basis of actual selling prices after deducting the actual expenses incurred for services performed and the selling fees. Some agents' contracts specify a fixed charge for harvesting, grading, packing, furnishing the container or other services, plus a selling fee, and thereby substantially reduce the record requirements necessary to prove the cost of the various operations.

§ 46.31 Duties of shippers.

(a) *General.* The responsibilities of shippers vary with their contract with growers to purchase produce or to handle produce on joint account. Similarly,

their responsibilities to their customers depend upon their contracts to sell, consign or joint account produce with dealers on terminal markets. Shippers shall pay promptly for produce purchased and any deficits incurred on consigned shipments. They shall fully comply with their obligations in connection with joint account transactions. A shipper who fails to perform any express or implied duty is in violation of the act and may be held liable for any damages resulting therefrom. The shipper shall prepare and maintain records which fully and correctly disclose the details of his transactions.

(b) *Receiving records.* Each shipper shall prepare and maintain a record of all produce received, including his own production. This record shall be in the form of a book (preferably a bound book) with numbered pages or comparable business records. This receiving record shall show for each lot the date received, whether purchased or received on joint account, the quantity, quality, and kind of produce, the purchase price or joint account cost, and the name and address of the supplier. Each shipper shall issue receipts to growers and others for all produce received.

(c) *Disposition records.* When a shipper purchases all of his produce from growers or others, his records shall also show the disposition of the produce, whether sold or consigned, date of shipment, car number, or if shipped by truck, the license number, name and address of the carrier, name and address of the buyer, commission merchant or auction, and other pertinent details of the transaction, such as the terms of sale, selling price, and date of payment.

(d) *Joint accounts with growers.* When a shipper enters into a joint account transaction with growers or others, the agreement between the parties should be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the shipper's authority in distributing the produce. The shipper shall prepare and maintain records to show in detail the actual expenses incurred for the services he furnishes, such as harvesting, grading, packing and selling the produce (unless a fixed charge is agreed upon by the parties to cover the cost of these services), methods of distribution and proceeds received for the produce. If a shipper is at the same time handling similar produce not involved in the joint account transaction, a lot number or other positive means of identification shall be assigned to each lot of produce received in order to segregate and identify the various lots of produce. If a shipper consigns all or part of the produce or employs the services of brokers or terminal

market auctions, his records shall show the results of these transactions, including the expenses involved and the names the names and addresses of the commission merchants, brokers, and the auctions. The shipper shall render a detailed and accurate accounting and pay promptly the net proceeds due the joint partner in accordance with § 46.2 (y), (z), and (aa). The accounting shall disclose the status of all claims collected or filed with the carriers.

(e) *Joint accounts with receivers.* When a shipper enters into a joint account agreement with a terminal market dealer, the agreement should be reduced to writing clearly defining the terms of the agreement. The shipper's records shall show the expenses which may be properly charged in accordance with the joint agreement, purchase price or joint account cost of the produce, and cost of harvesting, packing, grading, or other expenses. His records shall show the quantity and quality of the produce packed and shipped, the dates and methods of shipment, and all other pertinent details of his operation. At the conclusion of the transaction, a detailed and accurate accounting shall be furnished promptly to the joint partner, in accordance with § 46.2(z). If a deficit results, the shipper shall pay promptly his share of the deficit.

§ 46.32 Duties of growers' agents.

(a) *General.* The duties, responsibilities, and extent of the authority of a growers' agent depend on the type of contract made with the growers. Agreements between growers and agents should be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the agent's authority in distributing the produce. When such agreements between the parties are not reduced to written contracts, the agent shall have available a written statement describing the terms under which he will handle the produce of the grower during the current season and shall mail or deliver this statement to the growers on or before receipt of the first lot. A grower will be considered to have agreed to these terms if, after receiving such statement, he delivers his produce to the agent for handling in the usual manner. In the event an unsolicited lot of produce is accepted by an agent, he shall promptly deliver or mail a copy of such statement to the grower. A copy of this statement, showing the name of the grower and the date of the statement was delivered to the grower, shall be retained in the agent's files. An agent who does not have in his files either written contracts or a written statement as required herein is failing to prepare and

maintain full and complete records as required by the act. *Provided*, That regulations or bylaws of cooperative marketing associations may be used in lieu of individual agreements or contracts to determine the methods of accounting and settlement with their grower members. An agent who fails to perform any specification or duty, express or implied, is in violation of the act and may be held liable for any damages resulting therefrom and for other penalties provided under the act for such failure.

(b) *Accounting for charges.* A growers' agent whose operations include such services as the planting, harvesting, grading, packing, furnishing of containers or other supplies, storing, selling, or distributing produce for or on behalf of growers shall prepare and maintain complete records on all transactions in sufficient detail as to be readily understood and audited. Agents must be in a position to render to the growers accurate and detailed accountings covering all aspects of their handling of the produce. Agents shall maintain a record of all produce received in the form of a book (preferably a bound book) with numbered pages or comparable business records, showing for each lot the date received, quantity, the kind of produce and the name and address of the grower. Agents shall issue receipts to growers and others for all produce received. A lot number or other positive means of identification shall be assigned to each lot in order to segregate the various lots of produce received from different growers from similar produce being handled at the same time. Each lot shall be so identified and segregated throughout all operations conducted by the agent, including the sale or other disposition of the produce. The records shall show the result of all packing and grading operations, including the quantity lost through packing and grading and quantity and quality packed out. If the culls are sold, they shall be included in the accounting. Unless there is a specific agreement with the growers to pool all various growers' produce, the accounting to each of the growers shall itemize the actual expenses incurred for the various operations conducted by the agent and all the details of the disposition of the produce received from each grower including all sales, adjustments, rejections, details of consigned or jointed shipments and sales through brokers, auctions, and status of all claims filed with or collected from the carriers. The agent shall prepare and maintain full and complete records on all details of such distribution to provide supporting evidence for the accounting. If an agent is working under a pool agreement with growers, the accounting shall show how the pool cost and pool

sales prices are computed. If the agent and the growers have agreed on a fixed charge to cover the various operations conducted by the agent, actual expenses incurred for these services covered by the agreement are not required to be shown in the accounting. The failure of the agent to render prompt, accurate and detailed accountings in accordance with § 46.2(z) and (aa), is a violation of the act.

(c) *Sales through brokers or auctions.* Unless a growers' agent is specifically authorized in his contract with the growers to use the services of brokers, commission merchants, joint partners, or auctions, he is not entitled to use these methods of marketing the growers' produce. Any expenses incurred for such services, without the growers' permission, cannot be charged to the growers.

(d) *Filing of carrier claims.* Without the prior consent of the growers, an agent has no authority to file claims with the carriers in his own name or any other name. An agent has no obligation to file carrier claims on shipments for growers in the absence of a specific agreement to perform these duties. All information which an agent has received in handling the shipment which is essential for the growers to file such claims shall be made available to the growers. If an agent has an agreement with the growers to file and handle carrier claims, he shall exercise reasonable care in handling the claims with the carriers by filing the claim promptly in the proper amount, supported by adequate evidence, and take the necessary action to bring the matter to a conclusion.

(e) *Purchases and sales by growers' agents.* A person who operates in a dual capacity, both as a growers' agent and as a shipper, shall clearly disclose his status in each transaction to all parties with whom he is dealing. If such a person misrepresents himself as an agent, when he is acting as a shipper selling produce he has purchased, he shall be considered to have violated the act. A growers' agent shall not charge or receive a fee from the seller or the buyer when he purchases or sells produce as a shipper. A growers' agent shall not negotiate a transaction where he is subject to the direct or indirect control of any party to such transactions, other than his principal, or where the other party is subject to the agent's direct or indirect control, without fully disclosing the circumstances to his principal and obtaining his specific prior approval.

(f) *Negligence of agent.* A growers' agent may be held liable for any loss or damage resulting to the growers due to his negligence or failure to perform any specification or duty, express or implied, arising out of any undertaking in connection with transac-

tions subject to the act.

(g) *Responsibility for payment.* An agent is not responsible for the payment by the buyer who has purchased the growers' produce on credit, unless he guarantees payment or is negligent in extending credit. Agreement to collect from the buyer and remit to his principal is not a guarantee by the agent that the agent will pay if the buyer does not pay.

(h) *Responsibility for payment of selling fees and expenses to the growers' agent.* In the absence of a specific agreement to the contrary, the agent does not guarantee the performance of the contracting parties and he is entitled to the payment of his selling fees and expenses incurred in handling the produce of growers or others, providing he fully performs his duties as agent.

(i) *Agent's financial responsibility to buyers for failure to comply with contracts.* If a growers' agent contracts in his own name to deliver produce to a buyer and subsequently cannot deliver produce complying with the contract because the growers cannot or will not deliver such produce to him, he may be liable to the buyer for damages resulting from the breach of the contract.

CONVERSION OF FUNDS

§ 46.33 Conversion of funds.

Any licensee who collects or receives funds for or on behalf of another person or firm in connection with produce shall not make any use or disposition of such funds in his possession or control that will endanger or impair faithful and prompt payment to the owner or consignor of the produce or to any other person having a financial interest therein.

DISCLOSURE OF BUSINESS

§ 46.34 No disclosure of business of licensee.

No representative of the Department shall, without the consent of the licensee, divulge or make known, except to financially interested parties, or to other representatives of the Department who may be required to have such knowledge in the regular course of their official duties, or except insofar as he may be directed by the Secretary, Deputy Administrator, Director, or a court of competent jurisdiction, any facts or information regarding the business of such licensee which may have come to the knowledge of such representative through an examination or inspection of the business or the accounts of the licensee, unless such facts or information

should be testified to at a hearing authorized by the Act because they are relevant and material to the issue in the case being heard.

SUSPENSION AND REVOCATION OF LICENSES

§ 46.35 Suspension or revocation order.

(a) Whenever the Secretary shall order the suspension or revocation of a license, the person against whom such order is directed shall be served by the Hearing Clerk with a copy of the order, and be notified of the effective date thereof. Service of orders shall be accomplished in accordance with § 47.4 of this chapter.

(b) Except in the case of any license automatically suspended by the Act, a reasonable time shall be allowed, which shall not be less than 10 days between the date of issuance of the order of suspension or revocation and the date upon which such order becomes effective, during which period the licensee may make all necessary arrangements with some other person, who has a valid and effective license to safeguard the interests of consignors or other innocent parties whose property or business may be affected by such suspension or revocation and during which the licensee may terminate his affairs and business relating to the handling of produce.

(c) After the revocation of his license or during the effective period of any suspension thereof, no person shall, either directly or indirectly, through any agent, employee, or otherwise, carry on the business of a commission merchant, dealer, or broker until his status as a licensee has been restored.

(d) The suspension or revocation of a license shall not prevent the licensee from collecting amounts due on contracts entered into prior to the date of suspension or revocation or from remitting promptly to his principals and obligees.

PUBLICATION OF FACTS

§ 46.36 Publicity.

Upon the issuance by the Secretary of an order revoking or suspending a license, or in case of automatic suspension of a license for failure to pay a reparation award, the Director shall cause general publicity to be given to such fact, in order that those doing business with the licensee whose license has been revoked or suspended may take due notice thereof.

SUNDAYS AND HOLIDAYS

§ 46.37 Sundays and holidays excluded.

Sundays and holidays shall not be included in the computation of the 5-day period provided by section 7(d) of the Act nor in connection with the periods defined in 46.43 with exception of paragraph (a) thereof.

§ 46.38 Sundays and holidays included.

Sundays and holidays shall be included in the computation of all other periods mentioned in the Act or in the regulations in this part.

COMMODITY INSPECTION

§ 46.39 Inspection of commodities.

Each licensee shall, during ordinary business hours, promptly upon request, permit any duly authorized representative of the Department to inspect any lot of produce under his ownership or control covered by this act. Any necessary facilities for such inspection shall be extended to such representative by the licensee, his agents, and employees. The licensee shall be furnished a copy of any certificate or memorandum of inspection which is issued for any lot of his produce which is inspected in accordance with this section.

§ 46.40 Inspection service.

The rules and regulations of the Secretary governing inspection and certification of fresh fruits and vegetables as outlined in Part 51 of this chapter; and frozen fruits and vegetables as outlined in Part 52 of this chapter; and amendments thereto, and such additional amendments as may from time to time be promulgated shall govern the inspection of such products under this Act and are hereby made a part of the regulations in this part.

LICENSEE'S RESPONSIBILITY FOR ACTS OF EMPLOYEES AND AGENTS

§ 46.41 Licensee's responsibility for acts of employees and agents.

In construing and enforcing the provisions of the Act and the regulations in this part, the act, omission, or failure of any agent, officer, or other person acting for or employed by a licensee, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of the licensee.

[25 FR 4853, June 2, 1960. Redesignated at 28 FR 7067, July 11, 1963]

COPIES OF RECORDS

§ 46.42 Copies of records; how obtained.

Copies of records pertaining to licensees under the Act may be furnished under the conditions and at the prices prescribed in the regulations of the Department.

[25 FR 4853, June 2, 1960. Redesignated at 28 FR 7067, July 11, 1963]

TRADE TERMS AND DEFINITIONS

§ 46.43 Terms construed.

The following terms and definitions, when used in any contract or communication involving any transaction coming within the scope of the Act, shall be construed as follows:

(a) "Today's shipment," or shipment on a specified date (such as "shipment September 12"), means in connection with shipments by rail, that the goods referred to shall be under billing by the transportation company on the date the order is given or on the date specified in time to be picked up by a train scheduled to move that day's loadings from the shipping point. When used in connection with shipments by boat, this term shall mean that the goods shall be placed alongside the boat and be under billing in time to be loaded and shipped on a boat scheduled to leave before midnight of the date specified. When used in connection with shipments by truck, this term shall mean that the goods shall be loaded and shall actually start from loading point to destination before midnight of the date specified.

(b) "Tomorrow's shipment" or "immediate shipment" means that the shipment referred to shall be under billing by the transportation company in time

to move on a transportation facility scheduled to leave not more than 24 hours later than allowed under "Today's shipment."

(c) "Quick shipment" means that the condition of the offer, order, or confirmation will be met if the shipment is under billing by the transportation company in time to move on a transportation facility scheduled to leave not more than 48 hours later than allowed under "today's shipment."

(d) "Prompt shipment" means that the conditions of the offer, order, or confirmation will be met if the shipment is under billing by the transportation company in time to move on a transportation facility scheduled to leave not more than 72 hours later than allowed under "today's shipment."

(e) "Shipment first part of week" or "shipment early part of week" means that the produce referred to shall be under billing on Monday or Tuesday of the week specified in time to be picked up by a train scheduled to move these day's loadings from the shipping point. When used in connection with shipments by truck, this term shall mean that the goods shall be loaded and shall actually start from loading point to destination before midnight on Tuesday of the week specified.

(f) "Shipment middle of week" means that the produce referred to shall be under billing by the transportation company in time to move on a transportation facility scheduled to leave Wednesday or Thursday of the week specified. When used in connection with shipments by truck, this term shall mean that the goods shall be loaded and shall actually start from loading point to destination before midnight on Thursday of the week specified.

(g) "Shipment last of week" or "shipment latter part of week" means that the produce referred to shall be under billing by the transportation company in time to move on a transportation facility scheduled to leave on Friday or Saturday of the week specified. When used in connection with shipments by truck, this term shall mean that the goods shall be loaded and shall actually start from loading point to destination before midnight on Saturday of the week specified.

(h) "Shipment as soon as possible" or "shipment as soon as car (truck) can be secured" means that the shipper is uncertain as to when the shipment can be made, but expects to make it within a reasonable time and will make it soon as possible. But in any case where these words are used the buyer shall, at any time after 7 days from the date the order is given, have the right to cancel the order or contract of sale, if notice of his decision so to cancel shall have been received by the shipper before ship-

ment has been made.

(i) "F.o.b." (for example, "f.o.b. Laredo, Tex.," or "f.o.b. California") means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition (see definitions of "suitable shipping conditions," paragraphs (j) and (k) of this section), and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. The buyer shall have the right of inspection at destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at time of shipment, subject to the provisions covering suitable shipping condition.

(j) "Suitable shipping condition", in relation to direct shipments, means that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. If a good delivery standard for a commodity is set forth in § 46.44 and that commodity at the contract destination contains deterioration in excess of any tolerance provided therein, it will be considered abnormally deteriorated. The seller has no responsibility for any deterioration in transit if there is no contract destination agreed upon between the parties.

(k) "Suitable shipping condition", in connection with reconsigned rolling or tramp cars, means that the commodity at time of sale, meets the requirements of this phrase as defined in paragraph (j) of this section, relating to direct shipments.

(l) "F.o.b. acceptance" or "Shipping point acceptance" means that the buyer accepts the produce at shipping point and has no right of rejection. The buyer has recourse against the seller if the produce was not in suitable shipping condition (see definitions, paragraphs (j) and (k) of this section) or has recourse for a material breach of contract, providing the shipment is not rejected. The buyer's remedy under this method of purchase is by recovery of damages from the seller and not by rejection.

(m) "F.o.b. acceptance final" or "Shipping point acceptance final" means that the buyer accepts the produce at shipping point and has no right of rejection. Suitable shipping condition does not apply under this trade term. The buyer does have recourse for a material breach of contract, providing the shipment is not rejected. The buyer's remedy under this type of contract is by recovery of damages from the seller and not by rejection of the shipment.

(n) "F.o.b. steamer" means that the produce is to be placed free on board steamer at shipping point, in suitable shipping condition (see definitions of "suitable shipping condition," paragraphs (j) and (k) of this section) in accordance with the terms of the contract, and that the buyer assumes all responsibility and risk of damage thereafter.

(o) "F.a.s. steamer" means that the produce is to be delivered free alongside the steamer, in suitable shipping condition (see definitions of "suitable shipping condition," paragraphs (j) and (k) of this section), in accordance with the terms of the contract, and that the buyer assumes all responsibility and risk of damage thereafter.

(p) "Delivered" or "delivered sale" means that the produce is to be delivered by the seller on board car, or truck or on dock if delivered by boat, at the market in which the the buyer is located, or at such other market as is agreed upon, free of any and all charges for transportation or protective service. The seller assumes all risks of loss and damage in transit not caused by the buyer. For example, a sale of "U.S. No. 1 potatoes delivered Chicago" means that the potatoes, when tendered for delivery at Chicago, shall meet all the requirements of the U.S. No. 1 grade as to quality and condition.

(q) "In transit," "roller," or "rolling car" means that the produce referred to is in possession of the transportation company and under movement from shipping point when the quotation is made, and that the car is moving over a route in line of haul between the point of origin and the market in which delivery is to be made and has been so moving since date of shipment, without any delay attributable to the shipper or his agent. Unless otherwise specifically agreed, if a roller, rolling car, or a car in transit is sold f.o.b. shipping point, the buyer shall be deemed to have assumed only the lowest all-rail freight charges applicable for the shipment between the point of origin and the contract destination agreed upon between the parties together with such other charges which would have accrued if the car had been originally shipped direct to the contract destination: *Provided*, That the buyer is not liable for payment for protective services if the seller does not inform him of the kind and extent of such services ordered from the carrier.

(r) "Tramp car" or "tramp car sale" means that the produce has left the shipping point under a bill of lading issued prior to the day on which the quotation is made and has moved or is moving over a route out of line of haul with the market in which it is to be delivered or in which it is being offered or

quoted, or has been moving over a route in line of haul between the point of origin and the market in which it is to be delivered or in which it is being offered or quoted, but has been delayed in transit by the seller, or has been held by the transportation company at diversion or other points en route awaiting instructions from the shipper and by such holding or delay has missed scheduled movement between points of shipment and the market in which it is to be delivered as the result of the transaction in question. Unless otherwise specifically agreed, if a "tramp car" is sold f.o.b. shipping point or a "tramp car sale" is made f.o.b. shipping point, the buyer shall be deemed to assume only the lowest authorized all-rail freight charges applicable for the shipment between the point of origin and the contract destination agreed upon between the parties, together with such other charges which would have accrued if the car had been originally shipped direct to the contract destination; *Provided*, That the buyer is not liable for payment for protective services if the seller does not inform him of the kind and extent of such services ordered from the carrier.

(s) "Rolling acceptance" means that the buyer accepts at time of purchase produce which is in the custody of the transportation company and under movement from shipping point, under the terms and conditions described in paragraphs (q) and (r) of this section, except that the buyer assumes full responsibility for transportation of the goods from time of purchase, has no recourse against the seller because of any change in condition after time of purchase unless the goods at the time of sale were not in suitable shipping condition, and had no right of rejection on arrival. The buyer's remedy under this method of purchase is by recovery of damages from the shipper and not by rejection of the shipment. By agreement between the parties, however, the purchase may be made subject to inspection at any specified point while the car is rolling or in transit and the point at which the buyer will assume transportation charges may be specified without affecting the time of acceptance of the commodity.

(t) "Rolling acceptance final" means the same as "Rolling acceptance" except that the buyer has no recourse against the seller because of any change in condition of the produce in transit. The buyer has recourse against the seller for any material breach of the contract providing the shipment is not rejected. The buyer's remedy under this type of contract is recovery of damages from the seller and not by rejection.

(u)(1) "Tracksale" or "sale on track" means a sale of produce on track after transit and after

inspection or opportunity for inspection by the buyer, or his agent, who shall be considered to have waived any right to reject the commodity so purchased upon receipt by him or his duly authorized representative from the seller or his duly authorized representative of the bill of lading, delivery order, or other document enabling him to obtain the goods from the carrier.

(2) The above definition shall not be construed as depriving the buyer of a right to reparation when the unloading of the car demonstrates that a part of the lading which was not accessible to inspection was of a quality or condition materially inferior to that portion which was accessible to inspection; but notice of intention to file a claim for reparation must be given the seller within 24 hours after receipt by the buyer of the delivery order or bill of lading.

(3) If the seller gives the date of arrival when quoting price, the buyer shall, in the absence of any written memorandum of sale to the contrary, assume all charges that accrue on the shipment from the date of its arrival. If the seller fails to furnish the date of arrival when quoting price the buyer may, in the absence of any written memorandum of sale which includes the date of arrival or specific written statement as to who shall assume such charges as have accrued after arrival, assume that the shipment arrived at point of sale on the day and date upon which the purchase was made, and shall be liable only for such charges as would properly attach to a shipment arriving on the date the purchase was made.

(v) "C.a.f., " "c.a.c., " and "c.i.f." means "cost and freight," "cost and charges," and "cost, insurance, and freight," respectively. C.a.f. sales shall be deemed to be the same as f.o.b. sales, except that the selling price shall include the correct freight charges to destination. C.a.c. sales shall be deemed to be the same as f.o.b. sales, except that the selling price includes the correct freight and refrigeration or heater charges to destination. C.i.f. sales shall be deemed to be the same as f.o.b. sales, except that the selling price includes insurance and the correct freight and refrigeration or heater charges to destination.

(w) "Carload," "carlot," or "car" when used in offers, quotations, or contracts in which the quantity is not more definitely specified, and in the absence of well-established trade custom or standard as to size of a "carload," "carlot," or "car" of the produce in question, means not less than the minimum quantity required by the carrier's tariff applicable to the

movement, and not more than 10 percent in excess of such minimum tariff requirements, except that, where the carrier's tariffs provide alternative rates and minimum, the buyer shall state which tariff minimum must be observed, and, in event of failure so to do, the shipper may exercise his discretion, in no case, however, exceeding the higher alternative minimum quantity provided by the tariff, with only such variations therefrom as are permitted by this paragraph.

(x) "Shipping-point inspection" means that the seller is required to obtain Federal or Federal-State inspection, or such private inspection as has been mutually agreed upon, to show the compliance of the lot sold with the quality, condition, and grade specifications of the contract, and that the seller assumes the risk incident to incorrect certification.

(y) "Shipping-point inspection final" or "inspection final," following the name of the State or point, as "California inspection final," means that the seller is required to obtain Federal or Federal-State inspection, or such private inspection as has been mutually agreed upon, to show the compliance of the lot sold with the quality, condition, and grade specifications of the contract, and that the seller assumes the risk incident to incorrect certification and is without recourse against the seller on account of quality, condition, and grade.

(z) "Subject approval Government inspection" means that the seller is required to obtain Federal or Federal-State inspection, or such private inspection as has been mutually agreed upon, and to correctly communicate, by wire or other agreed means, the statements on the certificate as to quality, condition and grade, and other essential information, whereupon the buyer, upon approval thereof, will be deemed to have accepted the produce without recourse against the seller on account of quality, condition, and grade.

(aa) "Guaranteed advance" used in connection with an advance payment on consigned produce means that the person making the advance guarantees that the net proceeds to the consignors shall at least equal the amount so advanced, and that the consignors cannot be held liable for any deficit resulting from the sale of the produce, if such deficit is not occasioned by or contributed to be an act of the consignor.

(bb) "Accommodation advance" or "regular advance," used in connection with an advance of money or credit against anticipated net proceeds to be realized from the sale of consigned produce, means that the consignor has received an advance of money or credit and that, if the consigned pro-

duce does not sell for enough to cover the cost of transportation and handling, including customary or agreed commission and the advance made to him, the consignor must return to the person making the advance a sum equal to the deficit sustained.

(cc) "Price arrival," in the absence of a contrary specific understanding, means that the produce is shipped either direct to the customer or to an agent of the consignor, for the benefit of the customer, the price to be subject to agreement between the customer and the consignor upon the arrival of the produce at the customer's destination, with sufficient time being permitted for inspection.

(dd) "F.o.b. inspection and acceptance arrival" means that the produce quoted or sold is to be placed by the seller free on board car or other agency of through transportation at shipping point, the cost of transportation to be borne by the buyer, but the seller to assume all risks of loss and damage in transit not caused by the buyer, who has the right to inspect the goods upon arrival and to reject them if, upon such inspection they are found not to be meet the specifications of the contract of sale at destination. The buyer may not reject without reasonable cause. Such a sale is f.o.b. only as to price and is on a delivered basis as to grade, quality, and condition.

(ee) "F.o.b. sale at delivered price" means the same as f.o.b., except that transportation charges from shipping point to destination shall be borne by the seller; that is, the sale is f.o.b. as to grade quality, and condition, and delivered as to price.

(ff) "Purchase after inspection" means a purchase of produce after inspection or opportunity for inspection by the buyer or his agent. Under this term the buyer has no right of rejection and waives all warranties as to quality or condition, except warranties expressly made by the seller.

(gg) "Cash sale" means that the buyer is required to pay the seller within 24 hours after his acceptance of the shipment.

(hh) "Joint Account—Split Above" means that the receiving joint partner will pay promptly the agreed cost of the shipment to his joint partner. After disposition of the produce, the parties will divide equally the profits on the shipment after deduction of the cost of the shipment and proper expenses from the gross proceeds. The receiving joint partner will pay all expenses and cannot recover any loss resulting from the joint venture.

(ii) "Commercial Unit" means a single shipment of one or more perishable agricultural commodities tendered for delivery on a single contract, such commercial unit must be accepted or rejected in its entirety. Acceptance of a commercial unit does not

modify the parties' existing contractual rights and responsibilities.

[25 FR 4853, June 2, 1960, as amended at 26 FR 12209, Dec. 21, 1961. Redesignated at 28 FR 7067, July 11, 1963, and amended at 44 FR 50576, Aug. 29, 1979]

GOOD DELIVERY STANDARDS

§ 46.44 Good delivery.

Unless otherwise agreed to between the contracting parties, "Good Delivery" in connection with f.o.b. contracts of purchase and sale means the commodity meets the requirements of the contract at time of loading or sale and, if the shipment is handled under normal transportation service and conditions, will meet the following additional requirements on delivery at the contract destination:

(a) *Lettuce.* (1) If the contract specifies a U.S. grade, the lettuce may contain an average of not more than 3 percent, condition defects, including not more than 2 percent decay affecting any portion of the head exclusive of wrapper leaves in excess of the destination tolerances provided for the applicable grade in the U.S. Standards for Grades of Lettuce. (For example, the U.S. No. 1 grade provides 12 percent tolerance for damage at destination. If a lot contains 5 percent damage by permanent grade factors, 7 percent of the tolerance can be applied to damage by condition factors. The additional 3 percent Good Delivery tolerance would then allow a total of 10 percent damage by condition factors in this shipment at destination.)

(2) If the contract does not specify a U.S. grade or percentage of condition defects, the lettuce at destination may contain a maximum of 15 percent, by count, of the heads in any lot which are damaged by condition defects, including therein not more than 9 percent serious damage of which not more than 5 percent may be decay affecting any portion of the head exclusive of wrapper leaves. Sales made on a percentage of a U.S. grade, without specifying the percentage of condition defects separately from the permanent defects, fall under this provision, and the lettuce may not contain more than a total of 15 percent condition defects at destination. However, if the condition defects are specified, provision No. 3 will apply.

(3) If the contract specifies a percentage of individual or combined condition defects, the lettuce at destination may contain either of the following, whichever is greater:

(i) One and one-half times the specified percentage of damage or serious damage by condition defects provided that, if serious damage is not specified, one-half of the allowance at destination may be serious damage, including therein not more than one-quarter of the total allowance may be decay affecting any portion of the head exclusive of wrapper leaves. (For example, a lot sold as "16 percent tipburn" could have a total 24 percent damage by tipburn at destination, including not more than 12 percent serious damage of which not more than 6 percent may be decay affecting any portion of the head exclusive of wrapper leaves.) or

(ii) Up to 15 percent, by count, of the heads in any lot which are damaged by condition defects, including therein not more than 9 percent serious damage of which not more than 5 percent may be decay affecting any portion of the head exclusive of wrapper leaves.

Unless otherwise agreed to by the parties, condition defects will be considered to be damage as defined in the U.S. Standards for Lettuce.

(4) If the contract clearly indicates by descriptive terms that the lettuce is of inferior quality, larger allowances for damage by condition defects than those specified above will be applied.

(5) If the buyer and the seller agree to percentages for defects at destination, higher or lower than those specified above, such percentages will determine whether good delivery is made.

[26 FR 12209, Dec. 21, 1961. Redesignated at 28 FR 7067, July 11, 1963]

MISREPRESENTATION OR MISBRANDING

§ 46.45 Procedure in administering Section 2(5) of the Act.

It is a violation of section 2(5) for a commission merchant, dealer or broker to mispresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce.

(a) *Violations.* Violations are considered to be serious, very serious, or repeated and/or flagrant, depending upon the circumstances of the misrepresentation.

(1) *Serious violations.* Include the following:

(i) Any lot of a perishable agricultural commodity shown by official inspection to contain scorable defects, off-size, off-count, exceeding the tolerance(s) in an amount up to and including double the tolerance provided in the applicable grades, standards or inspection procedures;

(ii) Any lot of a perishable agricultural commodity officially certified as failing to meet the declared weight;

(iii) Any lot of a perishable agricultural commodity in which the State, country, or region of origin of the produce is misrepresented because the lot is made up of containers with various labels or markings that reflect more than one incorrect State, country or region of origin. Example: A lot with containers individually marked to show the origin as Idaho or Maine or Colorado when the produce was grown in Wisconsin; or

(iv) Any other physical act, verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

(2) *Very serious violations*. Include the following:

(i) Any lot of a perishable agricultural commodity shown by official inspection to contain scorable defects, off-size, off-count, in excess of double the tolerances(s) provided in the applicable grades, standards or inspection procedures;

(ii) Any lot of a perishable agricultural commodity packed in containers showing a single point of origin, which is other than that in which the produce was grown, such as containers marked "California" when the produce was grown in Arizona;

(iii) Any lot of a perishable agricultural commodity officially certified as having an average net weight more than four percent below the declared weight;

(iv) Multiple sales or shipments of a misrepresented perishable agricultural commodity within a seven day period that can be attributed to one cause; or

(v) Any other physical act, verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

(3) *Flagrant violations*: Include, but are not necessarily limited to, the following examples:

(i) Shipment or sale of a lot of a perishable agricultural commodity from shipping point after notification by official inspection that the inspected commodity fails to comply with any marking on the

container without first correcting the misbranding;

(ii) To offer for resale or consignment, a lot of a perishable agricultural commodity that has been officially inspected at destination and found to be misbranded without advising a prospective receiver that the lot is misbranded and that the misbranding must be corrected before resale. When a resale or consignment is finalized, written notice must be given that the lot is misbranded and must be corrected before resale; or

(iii) To withhold or fail to disclose known material facts with respect to a misrepresentation or misbranding.

(b) *Evidence.* (1) Evidence concerning a misrepresentation or misbranding includes official certificates of an inspection made by any person authorized by the Department to inspect fruits and vegetables or other public certifiers, and includes investigations and audit findings and any business records, testimony or other evidence bearing on the subject.

(2) When a lot of a perishable agricultural commodity has been officially inspected, and certification is made that the descriptive container markings are correct, but a subsequent inspection reverses the original findings, both inspection certificates will be accepted as evidence to show that the shipper/seller has *not* misrepresented the lot. The receiver of the commodity will be in violation if the misrepresentation is not corrected before the commodity is shipped, sold or offered for resale.

(c) *Sanctions.* (1) *informal:* When liability for a violation of section 2(5) of the Act is to be settled informally, the violator may:

(i) Be given written warnings; or

(ii) Be given notice that liability for a violation may be settled by admitting the violation in writing and paying a penalty in an amount satisfactory to the Secretary in lieu of formal disciplinary action. In the event of a formal proceeding to suspend or revoke the license of such person because he has committed other violation(s) the admitted violation(s) will not be used to support the formal complaint but may be admitted to show a course of conduct prior to the filing of the formal complaint;

(iii) The schedule for informal disposition is as follows:

Violation		Disposition
1st	(1)
2d	(1)
	(2)	(3)
3d	\$200	\$250
4th	350	500
5th	500	1,000
6th	1,000	2,000
7th	2,000	2,000

¹Warning letter.

²If serious violation.

³Very serious violation.

(2) *Formal:* Formal proceedings to suspend or revoke a license may be instituted at any time against a person who has committed repeated and/or flagrant violations.

(d) *Cumulative Record.* A cumulative record of a licensee's misrepresentation violations will be maintained with the following limitations:

(1) Two years after the date it was committed or after payment of a monetary penalty, the violation will not be used as a basis for instituting formal disciplinary action. However, it may be cited as a part of the pattern of the violations if formal proceedings are instituted and will be used in determining the level of monetary penalty for informal settlements.

(2) The record of violations not involved in formal proceedings will be expunged if there are no violations during a twenty-four (24) month period from the date of the most recent violation, or after thirty-six (36) months from the date of said violation, unless it was made a part of a formal disciplinary complaint.

(e) *Summary of Procedure.* (1) *Compilation of authority.* The rules defining misrepresentation, including misbranding, and for determining liability and disposition of violations are contained in the Act (7 U.S.C. 499 et seq.), in particular Sections 2(5) and 8 (7 U.S.C. 449b(5) and 499h), Section 46.45 of the Regulations (7 CFR 46.45), the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 CFR 1.130 et seq.), and in the Administrative Procedure Act (5 U.S.C. 551 et seq.).

(2) *Evidence of misrepresentation.* Evidence of misrepresentation or misbranding violations includes results of official inspections, audit findings, business records, or other documentation or testimony bearing on the subject. When a lot of fruits and vegetables has been officially inspected, and certification made that the descriptive markings on the container do not misrepresent the produce, but a

subsequent inspection reverses the original finding (such as to grade, size, weight, etc), the shipper/seller will *not* be charged with violation of the Act. However, the misrepresentation must be corrected before the lot is shipped, sold, or offered for resale.

(3) *Warning letters.* When informal settlement of liability is appropriate, violators are given two written warnings and an opportunity to take preventive action before formal action is considered. Warning letters include an explanation of the requirements of the Act and recommendations of actions which the violator can take to avoid future violations.

(4) *Informal sanctions.* Violations subsequent to the sending of the warning letters referred to above, other than flagrant violations, may be settled informally pursuant to paragraph (c)(1) of this section. This procedure permits the violator to resolve the matter by payment of a monetary penalty pursuant to a schedule set out in lieu of a formal proceeding.

(5) *Formal sanctions.* In cases involving repeated or flagrant violations of the Act, formal proceedings seeking the suspension or revocation of the violator's license may be instituted pursuant to the Rules of Practice governing such matters (7 CFR 1.130 *et seq.*). Except in cases of willfulness or where the public health, interest, or safety requires otherwise, a violator must be given written warning and opportunity to demonstrate or achieve compliance with the Act before its license can be suspended or revoked (5 U.S.C. 551 *et seq.*). The warning letters referred to above serve this purpose. If formal proceedings are instituted, the violator is afforded an oral hearing, if requested, before an Administrative Law Judge, an opportunity to appeal an adverse decision to the Department's Judicial Officer, and a further opportunity to appeal an adverse final decision to the appropriate United States Circuit Court of Appeals.

(6) Use of record of misrepresentation. A cumulative record of misrepresentation is maintained. It is used as a basis for determining whether a warning letter should be considered, and, if so, the amount of monetary penalty which is appropriate, or whether there is cause for instituting a formal disciplinary proceeding seeking suspension or revocation of the violator's license. But after payment of a monetary penalty or after two years from the date of the last violation, no formal disciplinary use can be made of the previous record of violation. The record of misrepresentation shall be erased if there are no further violations in the twenty-four (24) month period immediately following the most recent violation, or after 36 months from the date of each individ-

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dual violation unless it is involved in formal disciplinary proceedings.

[43 FR 4964, Feb. 7, 1978, 46 FR 22745, 22746, April 21, 1981]

NOTE: The reporting and/or record-keeping requirements contained herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

**PERISHABLE AGRICULTURAL
COMMODITIES ACT, 1930¹
AS AMENDED**

(7 U.S.C. 499a-499s)

Sec.

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¹Approved June 10, 1930, 46 Stat. 531

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AN ACT To suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate and foreign commerce.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That*² when used in this Act—

SEC. 1 DEFINITIONS

- (1) The term "person" includes individuals, partnerships, corporations, and associations;
- (2) The term "Secretary" means the Secretary of Agriculture;
- (3) The term "interstate or foreign commerce" means commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or District of Columbia;
- (4) The term "perishable agricultural commodity"—
 - (A) means any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character; and
 - (B) includes cherries in brine as defined by the Secretary in accordance with trade usages;
- (5) The term "commission merchant" means any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another;
- (6) The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect to sales of any such commodity of his own raising; (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess

²The following portion is as amended by Act of April 13, 1934, 48 Stat. 584; Act of August 20, 1937, 50 Stat. 725; Act of June 29, 1940, 54 Stat. 696; and Act of October 1, 1962, 76 Stat. 693; November 4, 1969, 83 Stat. 182; Act of November 1, 1978, 92 Stat. 2381; and Act of December 22, 1982, 95 Stat. 1269.

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of \$230,000³; and (C) no person buying any commodity other than potatoes* for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine, within the meaning of paragraph (4) of this section. Any person not considered as a "dealer" under clauses (A), (B), and (C) may elect to secure a license under the provisions of section 3 of this Act, and in such case and while the license is in effect such person shall be considered as a "dealer";

(7) The term "broker" means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively, except that no person shall be deemed to be a "broker" if such person is an independent agent negotiating sales for and on behalf of the vendor and if the only sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of \$230,000⁴ in any calendar year;

(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association;

³Amended by P.L. 97-98 approved December 22, 1982, 95 Stat. 1269.

*After January 1, 1982.

⁴Ibid

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(10) The term "employ" and "employment" means any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self employment. (7 U.S.C. 499a.)

SEC. 2⁵ UNFAIR CONDUCT

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce;

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer;

(3) For any commission merchant to discard, dump, or destroy without reasonable cause any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce.

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, qual-

⁵Section as amended by Act of April 13, 1934, 48 Stat. 585; Act of June 19, 1936, 49 Stat. 1533; Act of August 20, 1937, 50 Stat. 725, 726; Act of June 29, 1940, 54 Stat. 696; Act of April 6, 1942, 56 Stat. 200; Act of July 30, 1956, 70 Stat. 726; and the Act of August 10, 1974, 88 Stat. 423.

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ty, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce: *Provided*, That any commission merchant, dealer, or broker who has violated—

“(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

“(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed \$2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts;”.⁶

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car of the State or country in which such commodity was produced;

(7) For any commission merchant, dealer, or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce. (7 U.S.C. 499b.)

⁶Section as amended October 18, 1982 96 STAT 1667.

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SEC. 3⁷ LICENSES

By whom license required; penalty for failure to obtain

(a) After December 10, 1930, no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time. Any person who violates any provision of this subsection shall be liable to a penalty of not more than \$500 for each such offense and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil suit brought by the United States.

Any person violating this provision may, upon a showing satisfactory to the Secretary of Agriculture, or his authorized representative, that such violation was not willful but was due to inadvertence, be permitted by the Secretary, or such representative, to settle his liability in the matter by the payment of the fees due for the period covered by such violation and an additional sum, not in excess of \$25, to be fixed by the Secretary of Agriculture or his authorized representative. Such payment shall be deposited in the Treasury of the United States in the same manner as regular license fees.

Application; fees; creation and limitation of Perishable Agricultural Commodities Act Fund; availability of fund for administrative expenses; budget requirement; notice of increase in annual fee; filing of views and objections to increase

(b) Any person desiring any such license shall make application to the Secretary. The Secretary may by regulation prescribe the information to be contained in such application and to be furnished thereafter. Upon the filing of the application, and annually thereafter, the applicant shall pay such fee as the Secretary determines necessary to meet the reasonable anticipated expenses for administering this Act and the Act to prevent the destruction or dumping of farm produce, approved March 3, 1927 (7 U.S.C. 491-497), but in no event shall such fee exceed \$180, plus \$72 for each branch or additional business facility operated by the applicant in excess of nine such facilities, as determined by the Secre-

⁷ Section as amended by Act of August 20, 1937, 50 Stat. 726; Act of June 15, 1950, 64 Stat. 217; Act of July 30, 1956, 70 Stat. 726; Act of October 1, 1962, 76 Stat. 673, 674; and Act of November 1, 1978, 92 Stat. 2381. Act of December 22, 1981, 95 Stat. 1269, 1270.

etary. Total annual fees for any applicant shall not exceed \$1200 in the aggregate.⁸. Such fee, when collected, shall be deposited in the Treasury of the United States as a special fund, without fiscal year limitation, to be designed as the "Perishable Agricultural Commodities Act Fund," which shall be available for all expenses necessary to the administration of this Act and the Act approved March 3, 1927, referred to above: *Provided*, That the amount of money accumulated and on hand in the special fund at the end of any fiscal year shall not exceed 25 percent of the projected budget for the next following fiscal year: *Provided further*, That financial statements prescribed by the Director of the Bureau of the Budget for the last completed fiscal year, and as estimated for the current and ensuing fiscal years, shall be included in the budget as submitted to the Congress annually. The Secretary shall give public notice of any increase to be made in the annual fee prescribed by him hereunder and shall allow a reasonable time prior to the effective date of such increase for interested persons to file their views on or objections to such increase.

Trade names; disapproval by Secretary; suspension of license for use of disapproved name; refusal of license for deceptive, misleading, or confusing name

(c) A licensee may conduct business in more than one trade name or change the name under which business is conducted without requiring an additional or new license. The Secretary may disapprove the use of a trade name if, in his opinion, the use of the trade name by the licensee would be deceptive, misleading, or confusing to the trade, and the Secretary may, after notice and opportunity for a hearing, suspend for a period not to exceed ninety days the license of any licensee who continues to use a trade name which the Secretary has disapproved for use by such licensee. The Secretary may refuse to issue a license to an applicant if he finds that the trade name in which the applicant proposes to do business would be deceptive, misleading, or confusing to the trade if used by such applicant (7 U.S.C. 499c).

⁸Amended by P.L. 97-98 approved Sec. 22, 1981, 95 Stat. 1269, 1270.

SEC. 4⁹ ISSUANCE OF LICENSE

Authority to do business; termination; renewal

(a) Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this Act, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant an/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this Act, or is automatically suspended under section 7(d) of this Act, but said license shall automatically terminate on any anniversary date thereof unless the annual fee has been paid: *Provided*, That notice of the necessity of paying the annual fee shall be mailed at least thirty days before the anniversary date: *Provided, further*, That if the annual fee is not paid by the anniversary date the licensee may obtain a renewal of that license at any time within thirty days by paying the fee provided in section 3(b), plus \$5, which shall be deposited in the Perishable Agricultural Commodities Act Fund provided for by section 3(b) of this Act, *And provided further*, That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination;

Refusal of license; grounds

(b) The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 8 of this Act within two years prior to the date of the application or whose license is currently under suspension;

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or

⁹Section as amended by Act of April 13, 1934, 48 Stat. 585, 586; Act of June 19, 1936, 49 Stat. 1533; Act of August 20, 1937, 50 Stat. 726; Act of October 1, 1962, 76 Stat. 674; and Act of November 6, 1978, 92 Stat. 2673 amending Bankruptcy law, (11 U.S.C. 101 et seq.) effective October 1, 1979.

repeated violation of section 2 of this Act, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect;

(C) within two years prior to the date of the application, has been found guilty in a Federal court of having violated the provisions of the Act of March 3, 1927 (7 U.S.C. 491-497), relating to the prevention of destruction and dumping of farm produce; or

(D) has failed, except in the case of bankruptcy and subject to his right of appeal under section 7(c) of this Act, to pay any reparation order issued against him within two years prior to the date of the application;

Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

(c) Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this Act and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 7(c) of this Act. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a deduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided;

Withholding license pending investigation

(d) The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts, respecting any violation of the Act by any officer, agent or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the Act by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

Refusal of license

(e) The Secretary may refuse to issue a license to an applicant if he finds that the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of stock, has, within three years prior to the date of the application, been adjudicated or discharged as a bankrupt, or was a general partner of a partnership or officer or holder of more than 10 per centum of the stock of a corporation adjudicated or discharged as a bankrupt, and if he finds that the circumstances of such bankruptcy warrant such a refusal, unless the applicant furnishes a bond of such nature and amount as

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may be determined by the Secretary or other assurance satisfactory to the Secretary that the business of the applicant will be conducted in accordance with this Act (7 U.S.C. 499d.)

SEC. 5¹⁰ LIABILITY TO PERSON INJURED

Amount of damages

(a) If any commission merchant, dealer, or broker violates any provision of section 2 of this Act he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violations.

Remedies

(b) Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies (7 U.S.C. 499e).

SEC. 6¹¹ COMPLAINT AND INVESTIGATION

Petition to Secretary of Agriculture; time of making; contents; service; answer

(a) Any person complaining of any violation of any provision of section 2 of this Act by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition, which shall briefly state the facts, where upon, if, in the opinion of the Secretary, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Secretary to the commission merchant, dealer, or broker, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Secretary.

¹⁰Section as amended by Act of August 20, 1937, 50 Stat. 728.

¹¹Section as amended by Act of April 13, 1934, 48 Stat. 586, 587; Act of August 20, 1937, 50 Stat. 728; Act of June 11, 1960, 74 Stat. 200; Act of October 1, 1962, 76 Stat. 675; Act of February 15, 1972, 86 Stat. 38, and Act of December 22, 1981; 95 Stat. 1270.

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Complaint to Secretary requesting investigation of violations; by whom made

(b) Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any employee of the United States Department of Agriculture or any interested person may file, in accordance with rules and regulations of the Secretary, a complaint of any violation of any provision of this Act by any commission merchant, dealer, or broker and may request an investigation of such complaint by the Secretary.

Service of complaint; hearing

(c) If there appear to be, in the opinion of the Secretary, any reasonable grounds for investigating any complaint made under this section, the Secretary shall investigate such complaint and may, if in his opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the said person is engaged in business: *Provided*, That in complaints wherein the amount claimed as damages does not exceed the sum of \$15,000 a hearing need not be held and proof in support of the complaint and in support of respondent's answer may be supplied in the form of depositions or verified statements of fact.

Determination by Secretary of violations

(d) After opportunity for hearing on complaints where the damages claimed exceed the sum of \$15,000 has been provided or waived and on complaints where damages claimed do not exceed the sum of \$15,000 not requiring hearing as provided herin, the Secretary shall determine whether or not the commission merchant, dealer, or broker has violated any provision of section 2 of this Act.

Complaints by nonresidents; bond for costs and fees

(e) ¹²In case a complaint is made by a nonresident of the United States, or by a resident of the

¹²Section as amended October 18, 1982 96 STAT 1667. The amendment shall not apply with respect to complaints made under section 6(e) of the Perishable Agricultural Commodities Act, 1930, before the date of enactment of this Act.

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United States to whom the claim of a nonresident of the United States has been assigned, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter claim by respondent: *Provided*, That the Secretary shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond. (7 U.S.C. 499f.)

SEC. 7¹³ REPARATION ORDER

Determination by Secretary of Agriculture of amount of damages; order for payment

(a) If after a hearing on a complaint made by any person under section 6 of this Act, or without hearing as provided in subsection 6, paragraphs (c) and (d) of section 6 of this Act, or upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Secretary determines that the commission merchant, dealer, or broker has violated any provision of section 2 of this Act, he shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. The Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation, reasonable fees and expenses incurred in connection with any such hearing. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary under such rules and regula-

¹³Section as amended by Act of April 13, 1934, 48 Stat. 587, 588; Act of June 19, 1936, 49 Stat. 1534; Act of August 20, 1937, 50 Stat. 728; Act of June 23, 1938, 52 Stat. 953; Act of May 14, 1940, 54 Stat. 214; Act of October 1, 1962, 76 Stat. 675; and Act of February 15, 1972, 86 Stat. 38.

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tions as he shall prescribe, unless the respondent has already made reparation to the person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Secretary with respect to the undisputed sum;

Failure to comply with order of Secretary; suit to enforce liability; order as evidence; costs and fees

(b) If any commission merchant, dealer, or broker does not pay the reparation award within the time specified in the Secretary's order, the complainant, or any person for whose benefit such order was made, may within three years of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the commission merchant, dealer, or broker, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States. Such suit in the district court shall proceed in all respects like other civil suits for damages, except that the findings and orders of the Secretary shall be *prima facie* evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit;

Appeal from reparation order; proceedings

(c) Either party adversely affected by the entry of a reparation order by the Secretary may, within 30 days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held: *Provided*, That in cases handled without a hearing in accordance with subsections (c) and (d) of section 6 of this Act, or in which a hearing has been waived by agreement of the parties, appeal shall be to the district court of the United States for the district in which the party complained against is located. Such appeal shall be perfected by the filing with the clerk

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of said court a notice of appeal, together with a petition in duplicate which shall recite prior proceedings before the Secretary and shall state the grounds upon which petitioner relies to defeat the right of the adverse party to recover the damages claimed, with proof of service thereof upon the adverse party. Such appeal shall not be effective unless within thirty days from and after the date of the reparation order the appellant also files with the clerk a bond in double the amount of reparation awarded against the appellant conditioned upon the payment of the judgement entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The clerk of court shall immediately forward a copy thereof to the Secretary of Agriculture, who shall forthwith prepare, certify, and file in said court a true copy of the Secretary's decision, findings of fact, conclusions, and order in said case, together with copies of the pleadings upon which the case was heard and submitted to the Secretary. Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be *prima facie* evidence of the facts therein stated. Appellee shall not be liable for costs in said court if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as part of his costs. Such petition and pleadings certified by the Secretary upon which decision was made by him shall upon filing in the district court constitute the pleadings upon which said trial de novo shall proceed subject to any amendment allowed in that court;

Suspension of license for failure to obey reparation order or appeal

(d) Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within 5 days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: *Provided*, That if on the appeal the appellee prevails or if the appeal is

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dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgement on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied. (7 U.S.C. 499g.)

SEC. 8¹⁴ GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE

Authority of Secretary

(a) Whenever (a) the Secretary determines, as provided in section 6 of this Act, that any commission merchant, dealer or broker has violated any of the provisions of section 2 of this Act, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;

Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

(b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 2 of this Act, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 7(c) of this Act.

¹⁴Section as amended by Act of April 13, 1934, 48 Stat. 588; Act of August 20, 1937, 50 Stat. 730; Act of July 30, 1956, 70 Stat. 727; and Act of October 1, 1962, 76 Stat. 675.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 2 of this Act, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this Act and that the licensee will pay all reparation awards, subject to its right of appeal under section 7(c) of this Act, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section;

Fraud in procurement

(c) If after a license shall have been issued to an applicant, the Secretary believes that the license was obtained through a false or misleading statement in the application therefor or through a misrepresentation, concealment, or withholding of facts, respecting any violation of the Act by any officer, agent, or employee, he may, after thirty days' notice and an opportunity for a hearing, revoke said license, whereupon no license shall be issued to said applicant or any applicant in which the person responsible for such false or misleading statement or misrepresentation, concealment, or withholding of facts is financially interested, except under the conditions set forth in paragraph (b) of section 4 of this Act.

Injunction

(d) In addition to being subject to the penalties provided by section 3(a) of this Act, any commission merchant, dealer, or broker who engages in or operates such business without a valid and effective license from the Secretary shall be liable to be pro-

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liable to be proceeded against in any court of competent jurisdiction in a suit by the United States for an injunction to restrain such defendant from further continuing so to engage in or operate such business, and, if the court shall find that the defendant is continuing to engage in such business without a valid and effective license, the court shall issue an injunction to restrain such defendant from continuing to engage in or to operate such business without such license. (7 U.S.C. 499h.)

SEC. 9 ACCOUNTS, RECORDS, AND MEMORANDA; DUTY OF LICENSEES TO KEEP; CONTENTS; SUSPENSION OF LICENSE FOR VIOLATION OF DUTY

Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership such business by stockholding or otherwise. If such accounts, records, and memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days. (7 U.S.C. 499i.)

SEC. 10 ORDERS; EFFECTIVE DATE; CON- TINUANCE IN FORCE; SUSPENSION, MODIF- ICATION AND SETTING ASIDE; PENALTY

Any order of the Secretary under this Act other than an order for the payment of money shall take effect within such reasonable time, not less than ten days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, accordingly as it is prescribed in the order, unless such order is suspended, modified, or set aside by the Secretary or is suspended, modified, or set aside by a court of competent jurisdiction. Any such order of the Secretary, if regularly made, shall be final, unless before the date prescribed for its taking effect application is made to a court of competent jurisdiction by the commission merchant, dealer, or broker against whom such order is directed to have such order set aside or its enforcement, operation, or execution suspended or restrained. (7 U.S.C. 499j.)

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SEC. 11 INJUNCTIONS; APPLICATION OF INJUNCTION LAWS GOVERNING ORDERS OF INTERSTATE COMMERCE COMMISSION

For the purpose of this Act the provisions of all laws relating to the suspending or restraining of the enforcement, operation, or execution, or the setting aside, in whole or in part, of the orders of the Interstate Commerce Commission are made applicable to orders of the Secretary under this Act and to any person subject to the provisions of this Act. (7 U.S.C. 499k.)

SEC. 12 VIOLATIONS; REPORT TO ATTORNEY GENERAL; PROCEEDINGS; COSTS

The Secretary may report any violation of this Act for which a civil penalty is provided to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay. The costs and expenses of such proceedings shall be paid out of the appropriation for the expenses of the courts of the United States. (7 U.S.C. 499l.)

SEC. 13¹⁵ COMPLAINTS; PROCEDURE, PENALTIES, ETC.

Investigation by Secretary of Agriculture; inspection of accounts, records and memoranda; penalty for refusing inspection

(a) The Secretary or his duly authorized agents shall have the right to inspect such accounts, records, and memoranda of any commission merchant, dealer, or broker as may be material (1) in the investigation of complaints under this Act or (2) to the determination of ownership, control, packer, or State, country, or region of origin in connection with commodity inspections, or (3) to ascertain whether section 9 of this Act is being complied with, and if any such commission merchant, dealer, or broker refuses to permit such inspection, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender until permission to make such inspection is given. The Secretary or his duly authorized agents shall have the right to inspect any lot of any perishable agricultural commodity covered by this Act, and if any commis-

¹⁵Section as amended by Act of July 30, 1956, 70 Stat. 727; and Act of October 15, 1970, 84 Stat 928; Act of November 1, 1978, 92 Stat 2381.

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sion merchant, dealer, or broker having ownership of or control over such lot fails or refuses to authorize or allow such inspection, the Secretary may, after thirty days' notice and an opportunity for a hearing, publish the facts and circumstances and/or, by order, suspend the license of the offender of a period not to exceed ninety days.

Inspection of records; surety bond; suspension of license

(b) The Secretary or Secretary's duly authorized agents, in order to insure that the prompt payment provision of section 2(4) of this Act is being complied with, shall from time to time inspect the accounts, records, and memoranda of any commission merchant, dealer, or broker determined in a formal disciplinary proceeding under section 6(b) of this Act to have violated such provision. The Secretary may also require that any such commission merchant, dealer, or broker furnish, maintain, and from time to time adjust a surety bond in form and amount satisfactory to the Secretary as assurance that such commission merchant's, dealer's, or broker's business will be conducted in accordance with this Act and that such commission merchant, dealer, or broker will pay all reparation awards, subject to its right of appeal under Section 7(c) of this Act: *Provided*, That if such surety bond is furnished, maintained, and adjusted as required by the Secretary, the Secretary shall not thereafter inspect the accounts, records, and memoranda of such commission merchant, dealer, or broker under this subsection more than once a year. If any such commission merchant, dealer, or broker refuses to permit such inspection or fails or refuses to furnish, maintain, or adjust such surety bond, the Secretary may publish the facts and circumstances and, by order, suspend the license of the offender until permission to make such inspection is given or such surety bond is furnished, maintained, or adjusted.

Hearings; subpoenas; oaths; witnesses; evidence

(c) The Secretary, or any officer or employee designated by him for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, receive evidence, and require by subpoena the attendance and testimony of witnesses and the production of such accounts, records, and memoranda as may be material for the determination of any complaint under this Act.

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Disobedience to subpoenas; remedies; contempt

(d) In case of disobedience to a subpoena, the Secretary or any of his examiners may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of accounts, records, and memoranda. Any district court of the United States within the jurisdiction of which any hearing is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring the person to appear before the Secretary or his examiner or to produce accounts, records, and memoranda if so ordered, or to give evidence touching any matter pertinent to any complaint; and any failure to obey such order of the court shall be punished by the court as a contempt thereof.

Depositions; production of accounts, records and memoranda

(e) The Secretary may order testimony to be taken by deposition in any proceeding or investigation or incident to any complaint pending under this Act at any state thereof. Such depositions may be taken before any person designated by the Secretary and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his direction and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce accounts, records, and memoranda in the same manner as witnesses may be compelled to appear and testify and produce accounts, records, and memoranda before the Secretary or any of his examiners.

Fees and mileage of witnesses

(f) Witnesses summoned before the Secretary or any officer or employee designated by him shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like service in the courts of the United States. (7 U.S.C. 499m.)

SEC. 14¹⁶ INSPECTION OF PERISHABLE AGRICULTURAL COMMODITIES

Employment of inspectors; fees and expenses; inspection certificate as evidence

(a) The Secretary is authorized, independently and in cooperation with other branches of the Government, State, or municipal agencies and/or any person, whether operating in one or more jurisdictions, to employ and/or license inspectors to inspect and certify, without regard to the filing of a complaint under this Act, to any interested person the class, quality, and/or condition of any lot of any perishable agricultural commodity when offered for interstate or foreign shipment or when received at places where the Secretary shall find it practicable to provide such service, under such rules and regulations as he may prescribe, including the payment of such fees and expenses as will be reasonable and as nearly as may be to cover the cost for the service rendered: *Provided*, That fees for inspections made by a licensed inspector, less the percentage thereof which he is allowed by the terms of his contract of his employment with the Secretary as compensation for his services, shall be deposited into the Treasury of the United States as miscellaneous receipts; and fees for inspections made by an inspector acting under a cooperative agreement with a State, municipality, or other person shall be disposed of in accordance with the terms of such agreement: *Provided further*, That expenses for travel and subsistence incurred by inspectors shall be paid by the applicant for inspection to the United States Department of Agriculture to be credited to the appropriation for carrying out the purposes of this Act: *And provided further*, That official inspection certificates for fresh fruits and vegetables issued by the Secretary of Agriculture pursuant to any law shall be received by all officers and all courts of the United States, in all proceedings under this Act, and in all transactions upon contract markets under Commodities Exchange Act (7 U.S.C. Chapter 1 Sections 1-17(a)), as *prima facie* evidence of the truth of the statements therein contained;

¹⁶Section as amended by Act of April 13, 1934, 48 Stat. 588; and Act of August 20, 1937, 50 Stat. 730.

Issuance of fraudulent certificates; penalties

(b) Whoever shall falsely make, issue, alter, forge, or counterfeit, or cause or procure to be falsely made, issued, altered, forged, or counterfeited, or willingly aid, cause, procure or assist in, or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate of inspection issued under authority of this Act, the Produce Agency Act of March 3, 1927 (7 U.S.C., secs. 491-497), or any Act making appropriations for the Department of Agriculture; or shall utter or publish as true or cause to be uttered or published as true and such false, forged, altered, or counterfeited certificate, for a fraudulent purpose, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than \$500 or by imprisonment for a period of not more than one year, or both, at the discretion of the court (7 U.S.C. 499n.)

SEC. 15¹⁷ RULES, REGULATIONS, AND ORDERS; APPOINTMENT, REMOVAL, AND COMPENSATION OF OFFICERS AND EMPLOYEES; EXPENDITURES; AUTHORIZATION OF APPROPRIATIONS; ABROGATION OF INCONSISTENT STATUTES

The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act, and may cooperate with any department or agency of the Government, and State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, binding, telegrams, telephones, law-books, books of reference, publications, furniture, stationery, office equipment, travel, and other supplies and expenses, including reporting services, as shall be necessary to the administration of this Act in the District of Columbia and elsewhere, from the Perishable Agricultural Commodities Act fund provided for by section 3(b) of this Act and any supplements to such fund, and as may be appropriated for by Congress; and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes. This Act shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects of this

¹⁷ As amended by Act of June 15, 1950, 64 Stat. 218.

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Act; but is intended that all such statutes shall remain in full force and effect except insofar only as they are inconsistent herewith or repugnant hereto. (7 U.S.C. 499o.)

SEC. 16 LIABILITY OF LICENSEES FOR ACTS AND OMISSIONS OF AGENTS

In construing and enforcing the provisions of this Act, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person. (7 U.S.C. 499p.)

SEC. 17 SEPARABILITY OF PROVISIONS

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby. (7 U.S.C. 499q.)

SEC. 18 SHORT TITLE

This Act may be cited as the "Perishable Agricultural Commodities Act. 1930." (7 U.S.C. 499r.)

SEC. 19¹⁸ DEPOSITING APPROPRIATIONS IN FUND

Any unexpended balances of appropriations for the current fiscal year, and any subsequent appropriations, made to carry out the Acts referred to in section 3(b) of this Act, may be deposited in the Perishable Agricultural Commodities Act fund. (7 U.S.C. 499s.)

¹⁸As amended by Act of June 15, 1950, 64 Stat. 218.



